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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1938.

No. 384.

GUARANTY TRUST COMPANY OF NEW YORK, as Trustee Under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage Dated January 1, 1912, Petitioner,

against

BERRYMAN HENWOOD, Trustee of St. Louis Southwestern Railway Company, Debtor, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, and SOUTHERN PACIFIC COMPANY, Respondents.

On Certiorari to the United States Circuit Court of Appeals For the Eighth Circuit.

BRIEF

For Respondent Berryman Henwood, Trustee.

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Cases Cited.

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OPINIONS BELOW.

The opinion of the Circuit Court of Appeals for the Eighth Circuit is reported in 98 F. (2d) 160. The District Court for the Eastern District of Missouri, Eastern Division, wrote no opinion, but its findings of fact and conclusions of law appear in the record (R. 127-143).

STATEMENT OF THE CASE.

St. Louis Southwestern Railway Company, the Principal Debtor in a proceeding for the reorganization of a railroad in the United States District Court for the Eastern District of Missouri, Eastern Division, is a Missouri corporation (R. 128, 158). As of January 1, 1912, this Debtor executed its First Terminal and Unifying Mortgage, conveying railroad properties in Missouri, Arkansas, Louisiana and Texas, and securing an issue of bonds known as its First Terminal and Unifying Mortgage Bonds (R. 129, 158). Bonds in the total amount of $21,638,000 were authenticated by Guaranty Trust Company of New York, as trustee under the mortgage, and were delivered to or on the order of the Debtor and are now held by various persons (R. 132, 159). Of this total, $13,533,000 principal amount of bonds are held by Chemical Bank & Trust Company, successor trustee under the Debtor's General and Refunding Mortgage, as partial security under that mortgage (R. 135, 163). Eight million sixty-three thousand dollars of the bonds are outstanding in the hands of the public.

The bonds held by the public were issued and sold in New York in 1912 to a group of American purchasers, and payment was received in money of the United States (R. 132, 160) in the sum of $835.00 for each bond (R. 132). These were all coupon bonds.

The coupon bonds issued under the First Terminal and Unifying Mortgage contain a foreign money option clause providing that payment will be made in New York in specified amounts of dollars, or at the option of the holders of the bonds and coupons in London, Amsterdam, Berlin or Paris, in specified amounts of pounds, guilders, marks or francs, respectively. The coupons contain a similar clause. The provisions of the bonds and coupons are correctly quoted by petitioner (Brief, 6-8). These provisions were

inserted pursuant to provisions of the indenture, reading as follows:

> "* * * said bonds, both as to principal and interest, to be payable at the office or agency of the Railway Company in the Borough of Manhattan, in the City and State of New York, in gold coin of the United States of America of or equal to the standard of weight and fineness as it existed January 1, 1912 (the coupon bonds also to be payable, both as to principal and interest, at such places in the following cities in foreign countries as the Board of Directors may from time to time designate, viz.: London, England, or Amsterdam, Holland, or Berlin, Germany, or Paris, France. * * *"

(R. 130, 18), and (Article First, Section 4, of the Indenture):

> "All or any of the coupon bonds issued hereunder from time to time shall be payable at the office or agency of the Railway Company in the Borough of Manhattan in the City and State of New York, or, at the option of the holders of said coupon bonds, in the cities and countries, respectively, and in the respective currencies stated in the form of coupon bond hereinbefore set forth, but **the face amount of each of such coupon bonds shall be $1,000 in United States gold coin** of the standard of weight and fineness existing on January 1, 1912, **or the equivalent thereof,** calculated at the rates of exchange stated in the form of coupon bond hereinbefore set forth. The principal amount of First Terminal and Unifying Bonds which the Railway Company shall be entitled to issue under the provisions of this indenture shall be ascertained at the like rate or rates of exchange, and, for all purposes of this indenture and of said bonds, the indebtedness represented by said bonds in United States gold coin, as aforesaid, shall be calculated at the like rate or rates of exchange" (R. 130, 38, 39).*

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*Unless otherwise indicated, emphasis in this brief is supplied.

terest on 5,636 bonds, said allowance being $1,000 for each of the bonds as principal, plus interest at the rate of 5 per cent per annum from July 1, 1935, to December 12, 1935, and disallowed the claim for any additional sum (R. 125). The Circuit Court of Appeals affirmed the District Court's judgment (R. 254).

QUESTIONS PRESENTED.

Petitioner's claim rests upon the propositions that (1) the option contained in the bonds for payment in a stated number of guilders or other foreign moneys at the option of the holders of the bonds is valid and enforceable; (2) such option when not exercised by the holders may be and has been exercised by the trustee under the mortgage; and (3) the value of the guilders sought to be recovered should be fixed at the date of the adjudication of the Debtor as a bankrupt or at the date of the demand for payment in guilders, and not at the value as of the date of the judgment allowing the claim, if allowed, or at the value as of the date of the confirmation of the plan of reorganization.

The courts below decided against the petitioner upon the first point, and consequently it was unnecessary for them to consider the second and third points necessary to sustain the petitioner's claim.

A fair statement of the question of law answered affirmatively by the District Court and the Circuit Court of Appeals is the following:

> "Does the Joint Resolution of Congress of June 5, 1933, directing that every obligation payable in money of the United States, heretofore or hereafter incurred, shall be discharged upon payment, dollar for dollar, in any coin or currency of the United States which at the time of payment is legal tender for public and private debts, direct the manner of discharge of bonds

sold in 1912, payable in 1952, by an American corporation to American purchasers in consideration of American money loaned in a transaction in no way related to money of any foreign country, where the bond contract when read with the mortgage indenture was to pay $1,000 in United States gold coin of the standard of weight and fineness as it existed January 1, 1912, or the equivalent thereof in specified amounts of foreign moneys at the holder's option?"

It is our position that none of the petitioner's propositions is sound. If this Court should disagree with the courts below as to the application of the Joint Resolution, it will be necessary for the other points to be decided.

In order to sustain the petitioner's position upon the second point, it would be necessary for the Court to answer the following question in the affirmative:

"Where, by the terms of the bonds, coupons and indenture of mortgage, the option to receive guilders instead of dollars was specifically reserved to the holders of the bonds and was not conferred upon the mortgage trustee, may the mortgage trustee elect to take guilders in behalf of the bondholders who have refrained from making such an election upon their own account and who have not authorized the mortgage trustee to make such an election for them?"

From the first, the respondents have contended that this question must be answered in the negative.

If the two preceding questions in this case should be decided in favor of the petitioner, an important question remains as to the measure of damages. This question may be stated as follows:

"Where an American corporation, which has agreed to pay guilders in Holland at the creditors' election, has filed a petition for reorganization under Section 77

> of the Bankruptcy Act, upon what date (assuming that such election may be and has been validly exercised) is the value of the guilder to be taken in determining the rights of the guilder claimants?"

The respondents contend that as the place for the payment of guilders is abroad, the claim therefor should be translated into dollars by applying the "judgment-date rule."

Petitioner states its belief that this Court will not desire to consider questions not concerning the Joint Resolution, because they were not considered below. This is not a case where a court below made findings of fact contrary to the respondents and review thereof is sought by the respondents without filing a cross petition as in **Guaranty Trust Company of New York v. United States**, 304 U. S. 126, 144, cited by the petitioner. On the contrary, the lack of power of the petitioner to elect payment in guilders is a further ground for supporting the judgment of the District Court, as affirmed by the Circuit Court of Appeals. There was no ruling against the respondents upon this point, and the respondents therefore could not have filed a cross petition with this Court. The question of damages arises necessarily if the other points made by the respondents are rejected. Both points were insisted upon by respondents from the first (R. 110, 111, 143, 150).

The petition for certiorari related only to the construction of the Joint Resolution. The respondents' brief in opposition thereto pointed out that the other questions were in the case and would have to be considered if the petition for certiorari should be granted without limitation. The petition was granted without limitation. The Supreme Court may consider any point in the record which would sustain the judgment of the courts below, regardless of whether such point was accepted in the opinions of such courts. **Langnes etc. v. Green**, 282 U. S. 531; **Story**

'archment Co. v. Paterson, 282 U. S. 555; Stelos Co. v. Iosiery Motor-Mend Corp., 295 U. S. 237; Robertson and Kirkham, Jurisdiction of the Supreme Court of the United tates, pages 804, 805.

This case does not come within the rule that this Court will not consider questions presented by the petitioner in rgument or brief and decided by the court below and not resented by it in a petition for certiorari (see **Connecticut Railway & Lighting Co. v. Palmer et al.**, U. S. Supreme Court, decided January 3, 1939), because respondents, by ointing out the existence of these questions in their brief n opposition to certiorari, have done all that they could o bring the matter to the Court's attention, and certainly he petitioner cannot arbitrarily restrict the grounds which may be urged in support of the judgment limiting he claim of the petitioner to the amount of its United tates dollar face.

If the rule be that the Supreme Court may exercise its iscretion as to allowing briefs and arguments on the additional points, such discretion should be exercised in favor f such allowance in this case, because of the desirability f speedy determination of all litigation in Section 77 reorganization proceedings.

The stipulation and findings of the District Court recite numerous facts which show that the proceeds were to be used for specified purposes in this country (R. 160-163, 133). The Debtor's First Terminal and Unifying Bonds were issued to evidence the Debtor's liability for the repayment of sums of United States money borrowed; they were not issued upon a sale or purchase of guilders or other foreign money; the provisions contained in the bonds for optional payment in guilders or other foreign moneys were an assurance, in addition to the "gold clause" contained in the bonds, to the holders thereof against a depreciation in the value of the United States dollar; and the amount of guilders mentioned in the bonds was at the time of the issuance of the bonds the equivalent of $1,000 United States gold coin of the standard of weight and fineness as it existed on January 1, 1912, and it was understood and specified in the indenture under which the bonds were issued that the amounts of guilders, pounds, francs or marks mentioned in the bonds were each the equivalent of United States gold coin in said amount and of such standard of weight and fineness (R. 134, 160-163, 165-168).

Because of monetary conditions in the several countries involved, there would have been no substantial advantage to the mortgage trustee or bondholders to claim payment in pounds, marks or francs, but a claim for 2,490 guilders on each $1,000 bond, if sustained, as of one of the dates mentioned by petitioner, would result in a premium of about 70 per cent on the face amount of the bonds and coupons over and above the principal dollar amount thereof (R. 140, 164). The claim on each $1,000 bond would increase to $1,687.722, with interest, and the aggregate indebtedness (if the guilder claims should be sustained for the entire issue) would increase from $21,638,000 to $37,335,525.12. Upon the bonds represented by the petitioner concerned in this case, the indebtedness would increase from $5,636,000 to $9,512,001.19. This situation resulted

from the legislative and executive action in 1933 which brought about a decrease in the gold content of the United States dollar, while the gold content of the guilder remained unchanged until September 27, 1936 (R. 167).

The guilder is the monetary unit of Holland (R. 137, 165). When the bonds were issued the guilder was worth \$.4020 (R. 140, 168) and \$1,000 would buy 2,490 guilders, the exact number specified in each of the coupon bonds. At the date of the execution of the stipulation in the District Court (November 8, 1937) the exchange value of the guilder was \$.5560 (R. 140, 165), and is now less. However, the exchange value of the guilder in terms of the dollar was considerably higher on several dates between 1933 and the date of execution of the stipulation. In this connection certain other dates may become important in respect of this claim, and the parties have stipulated that on each of the dates in question the exchange value was \$.6778 (R. 140, 164). It has been stipulated that this was the exchange value on December 12, 1935, the date on which the Debtor's reorganization petition was filed; on May 5, 1936, the date as of which the Guaranty Trust Company of New York accelerated the maturity of the bonds; and on September 24, 1936, the date on which the Guaranty Trust Company of New York executed its proof of claim (R. 140, 164, 165). This premium was occasioned by the diminution of the gold content of the United States dollar, while the gold content of the Dutch guilder remained constant.

The mortgage provides that certain of the bonds are payable at the offices of the Debtor in the several foreign countries named. The Debtor, however, has never maintained an office or agency in Amsterdam, Holland, for the payment of interest or principal on these bonds, or at any of the other foreign cities named (R. 132, 159). As a matter of fact, there was no demand for payment in guilders

SUMMARY OF ARGUMENT.

I.

The First Terminal and Unifying Mortgage Bonds are Payable, Dollar for Dollar, in Coin or Currency of the United States Which at the Time of Payment Is Legal Tender for Public and Private Debts, Irrespective of the Foreign Money Options Contained in the Coupon Bonds, by Reason of the Joint Resolution of Congress of June 5, 1933, Which Permits the Discharge of All Obligations Payable in United States Money in Such Legal Tender.

(A) The monetary legislation initiated in 1933 designedly accomplished a reduction in the equivalent of the United States dollar in gold and in foreign exchange, and the Joint Resolution of Congress of June 5, 1933, was adopted to relieve debtors who had guaranteed against such monetary reduction from the burden of their assurances, and without such relief devaluation of the dollar would not have been undertaken.

(B) The Joint Resolution provides that these bonds shall be discharged, dollar for dollar, in any coin or currency of the United States which at the time of payment is legal tender, irrespective of the other provisions for payment or discharge contained in the bonds.

1. The word "obligation," as used in the statute, means the bond or coupon or other contract as a whole, rather than particular provisions contained therein.

2. Bonds are "payable in money of the United States," within the meaning of the Joint Resolution, if payable in United States money at the unrestricted election of the obligee, although the obligee may have the option to re-

quire an alternative performance in gold, foreign moneys, or other commodities.

3. **Every obligation** payable in money of the United States is to be discharged upon payment, dollar for dollar, in current legal tender, irrespective of the other provisions contained therein, and the Joint Resolution may not be confined to the invalidation alone of the conventional gold clause.

4. A review of the authorities dealing with the Joint Resolution pertinent to obligations containing foreign money options indicates that the United States Supreme Court decisions support the decisions of the courts below, and that the holdings of other courts are divided.

5. The First Terminal and Unifying Bonds involved here are primarily United States money obligations, dischargeable as directed by the Joint Resolution, and the foreign moneys mentioned in the foreign money options were intended as equivalents of the United States gold coin called for by the bonds and coupons.

(C) As applied to the facts of this case, the arguments in petitioner's brief are not persuasive.

II.

Assuming That the Guilder Option Is Valid, Guaranty Trust Company of New York, as Mortgage Trustee, Had and Has No Right Under the Terms of the Bonds, Coupons or the Mortgage, or Under Amendatory Section 77, to Make an Election on Behalf of Holders of Any of the Bonds or Coupons for Guilders or Any Other of the Several Foreign Moneys Mentioned in the Mortgage, the Election Being Specifically Reserved by the Terms of the Bonds, Coupons and the Mortgage to the Holders of the Bonds and Coupons.

prior to June 5, 1933, the date of the Joint Resolution of Congress, 48 Stat. 112, 31 U. S. C. A., Section 463 (R. 134, 198). Believing that the Joint Resolution banned payments in foreign moneys, the Debtor did not provide for the payment of the bonds or coupons in any currency other than that of the United States, and it had no foreign paying agent at any time (R. 132, 180).

As the stipulation recites (R. 159), the petitioner, although it did not have the bonds in its possession, caused certain acts to be done in Holland purporting to elect payment of all of the First Terminal and Unifying Mortgage Bonds in guilders (R. 137). In June, 1936, petitioner published a notice in certain newspapers of its intention to signify an election to receive guilders and to file a claim for guilders (R. 137, 177). These acts were done by petitioner as trustee under the mortgage (R. 137, 160). The purported guilder election was by means of these acts and by the making and filing of the proof of claim and supplement thereto (R. 137, 159).

On May 5, 1936, pursuant to a petition of the railway Trustee, Guaranty Trust Company of New York, trustee, was enjoined by the District Court from accelerating the maturity of the bonds, such acceleration having been proposed because there had been defaults under the mortgage. The Circuit Court of Appeals reversed and remanded the injunction order and this Court denied certiorari. By order of the District Court on February 24, 1937, the injunction was dissolved (R. 136, 163), and, pursuant to that order, petitioner, on February 25, 1937, served a notice upon the railway Trustee and the Debtor to the effect that the principal of all of the bonds was due and payable immediately as of May 5, 1936 (R. 136, 163). In addition to this notice, petitioner, on March 15, 1937, filed its supplemental proof of claim, which also stated that the maturity of the bonds was accelerated as of that date (R. 104).

By far the largest amount of First Terminal and Unifying Bonds are held by citizens and residents of the United States or by domestic corporations (R. 135, 163, 198). In fact, in this case we are dealing exclusively with the rights of American holders (R. 135). Petitioner filed a claim under this mortgage (R. 2) and a supplement thereto (R. 104). This was a blanket claim which purports to cover all bonds issued under the First Terminal and Unifying Mortgage, and is a claim for 53,878,620 guilders. The proof of claim states, however, that the amount of the claim shall be reduced to the extent that valid individual proofs of claim are filed on behalf of bonds or coupons by the holders thereof, and by the amount by which the value of guilders exceeds the value of any money other than guilders which any holder or holders of the bonds or coupons elect to receive in respect thereof (R. 106). It follows that we are now considering only the rights of bondholders who have not filed separate claims. The claims of certain foreign holders have been filed separately, have been heard and are pending before a Special Master appointed by the District Court. The claim upon the $13,533,000 of pledged bonds was filed separately and is pending before this Court in Case No. 495, **Chemical Bank & Trust Co., Trustee, v. Henwood.**

To the claim of petitioner for guilders three protests were filed, one by Berryman Henwood, Trustee, representing all creditors (R. 106, 120); one by the Debtor (R. 112, 121), and one by Southern Pacific Company, a stockholder and creditor of the Debtor (R. 113, 122).

No other mortgage of the Debtor contains a foreign currency option clause similar to that contained in the First Terminal and Unifying Mortgage, although the other mortgages do contain gold clause provisions (R. 129, 168).

The District Court allowed the petitioner's claim in the amount of $5,636,000 for principal and $126,027.16 for in-

III.

If It Should Be Determined That the Bonds Are Payable in Guilders, Damages Are to Be Based on the Exchange Value of the Guilder in Terms of the United States Dollar As of the Judgment Date, i. e., When the Claim for Guilders Is Translated by the Action of the Reorganization Court Into Dollars.

(A) In a proceeding in this country to recover upon a contract to pay foreign moneys in a foreign country, the value of the foreign moneys is determined as of the date of the judgment.

(B) Applying the judgment-date rule to this Section 77 reorganization proceeding of a railroad, the guilder should be taken at either its face value upon the date of the judgment allowing the claim or upon the date of the order confirming the plan of reorganization.

(C) The contention of the petitioner that the value of the guilder should be taken at the date of the filing of the petition in reorganization may not be accepted because (1) based upon cases concerned with ordinary bankruptcies or insolvency proceedings where the petition date is given a significance lacking in a Section 77 proceeding; (2) not supported in fact by the cases cited even in ordinary bankruptcies or receiverships; and (3) impracticable of operation upon the particular facts of this case.

ARGUMENT.

I.

THE FIRST TERMINAL AND UNIFYING MORTGAGE BONDS ARE PAYABLE, DOLLAR FOR DOLLAR, IN COIN OR CURRENCY OF THE UNITED STATES WHICH AT THE TIME OF PAYMENT IS LEGAL TENDER FOR PUBLIC AND PRIVATE DEBTS, IRRESPECTIVE OF THE FOREIGN MONEY OPTIONS CONTAINED IN THE COUPON BONDS, BY REASON OF THE JOINT RESOLUTION OF CONGRESS OF JUNE 5, 1933, WHICH PERMITS THE DISCHARGE OF ALL OBLIGATIONS PAYABLE IN UNITED STATES MONEY IN SUCH LEGAL TENDER.

As stated above, the discrepancy between the value of the dollar and the guilder was brought about by certain legislative and executive action in 1933. Let us consider these acts in their chronological order before considering in detail the Joint Resolution of Congress of June 5, 1933, and its application to the facts in light of the decisions.

(A) The Monetary Legislation Initiated In 1933 Designedly Accomplished a Reduction in the Equivalent of the United States Dollar in Gold and In Foreign Exchange, and the Joint Resolution of Congress of June 5, 1933, Was Adopted to Relieve Debtors Who Had Guaranteed Against Such Monetary Reduction From the Burden of Their Assurances, and Without Such Relief Devaluation of the Dollar Would Not Have Been Undertaken.

The circumstances which led to the passage of the Joint Resolution are well known. In order to ascertain the intent of the legislative and executive branches of the gov-

ernment it will be helpful to consider not only the economic situation prevailing at the time, but also the legislation and executive proclamations which undertook to direct the country's financial and monetary policies. **Barrett v. Van Pelt,** 268 U. S. 85, 91; **Rhodes v. Iowa,** 170 U. S. 412, 422.

The legislation and proclamations have been reviewed in detail by Mr. Chief Justice Hughes in his opinion in **Norman v. B. & O. Railroad Company,** 294 U. S. 240, l. c. 245-297. As will appear upon a review of these actions, it is apparent that at the time the Joint Resolution was passed Congress had in mind devaluation of the gold content of the dollar and the establishment of a uniform currency.

On March 6, 1933, redemption in specie of United States money was suspended. Three days later, on March 9, 1933, the same control was given to the President over foreign exchange as over gold transactions. **Emergency Banking Relief Act,** 48 Stat. 1. See **Norman v. B. & O. Railroad Company,** supra, 295.

On May 12, 1933, was enacted the **Agricultural Adjustment Act,** 48 Stat. 31, whereby devaluation of the dollar was first authorized, and authority was conferred on the President in Section 43 "to fix the weight of the gold dollar in grains nine-tenths fine, and also to fix the weight of the silver dollar in grains nine-tenths fine at a definite fixed ratio in relation to the gold dollar at such amounts as he finds necessary from his investigation to stabilize domestic prices or to protect the foreign commerce against the adverse effect of depreciated foreign currencies." It was further provided that the "gold dollar, the weight of which is so fixed, shall be the standard unit of value," and that "all forms of money shall be maintained at a parity with this standard," but that "in no event shall the weight of the gold dollar be fixed so as to reduce its present weight by more than 50 per centum."

On June 5, 1933, the **Joint Resolution**, 48 Stat. 112, was passed. At the time of its passage it was recited that the legislation was directed against provisions in obligations "inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts."

On January 31, 1934, by **Presidential Proclamation**, the weight of the gold dollar was fixed at 15 5/21 grains of gold nine-tenths fine (48 Stat. 1730), instead of 25.8 grains (31 Stat. 45), the content of the old dollar. The old gold dollar was worth in terms of gold 69.3 per cent more than the new dollar.

Finally, the monetary policy of the United States was crystallized in the **Gold Reserve Act** of 1934, 48 Stat. 337, by which the Secretary of the Treasury was directed to use the stabilization fund arising from the devaluation program for the management of the value of United States money in terms of gold and in terms of foreign exchange. Section 10 (a) of that Act provides, in part, as follows:

> "For the purpose of stabilizing the exchange value of the dollar, the Secretary of the Treasury, with the approval of the President, directly or through such agencies as he may designate, is authorized, for the account of the fund established in this section, to deal in gold and foreign exchange and such other instruments of credit and securities as he may deem necessary to carry out the purposes of this section."

It is thus apparent that during all this time, which includes the time when the Joint Resolution was passed, Congress had in contemplation not only the devaluation of the dollar, but also the economic consequences that would flow therefrom, including the effect upon foreign exchange. Mr. Chief Justice Hughes recognized the grounds for this

Congressional action in **Norman v. B. & O. Railroad Co.,** supra, where he stated, at page 314, that "devaluation was in prospect and a uniform currency was intended." He summarized the grounds as follows, page 315:

> "The devaluation of the dollar placed the domestic economy upon a new basis. In the currency as thus provided, States and municipalities must receive their taxes; railroads, their rates and fares; public utilities, their charges for services. The income out of which they must meet their obligations is determined by the new standard. Yet, according to the contentions before us, while that income is thus controlled by law, their indebtedness on their 'gold bonds' must be met by an amount of currency determined by the former gold standard. Their receipts, in this view, would be fixed on one basis; their interest charges, and the principal of their obligations, on another. * * * It requires no acute analysis or profound economic inquiry to disclose the dislocation of the domestic economy which would be caused by such a disparity of conditions in which, it is insisted, those debtors under gold clauses should be required to pay one dollar and sixty-nine cents in currency while respectively receiving their taxes, rates, charges and prices on the basis of one dollar of that currency."

In devaluing the dollar and by the other acts referred to, it was evidently the intent of Congress to establish stability and uniformity and to avoid discrimination, but such uniformity could not be attained if debtors, by the provisions of their obligations, could be compelled to pay to one creditor more dollars than to another creditor, or to pay to all creditors more than the face of their obligations as expressed in old dollars.

The effect of the provision contained in a United States money obligation for payment at the holder's option in a foreign gold money is the same as that of the conventional "gold clause." Both clauses, if valid, would permit

the creditor to recover from the debtor an amount equivalent to the gold value of the United States dollar as it existed prior to reduction of its gold content. The amount of the premium in either case is approximately 70 per cent. It requires but an understanding of what the petitioner is seeking in this case to perceive that it is endeavoring to enforce the equivalent of the gold clause.

During all this time and until September 27, 1936, Holland remained on the gold standard and the gold content of the guilder was constant (R. 140, 167). While the guilder was not redeemable internally in gold, a United States citizen could secure gold or the equivalent in value of gold for guilders. The District Court found this to be a fact (R. 140).

Holland was upon what is technically known as the gold export basis. The effect, in the increase of the value of the guilder relative to our money, of the devaluation of the United States dollar, was automatic. The guilder increased in value from $.4020 to $.680567, just 69.3 per cent (R. 140, 168). Due to market fluctuations too small to be corrected by the shipment of gold, the market value of the guilder on the dates alleged by the petitioner to be significant was $.6778 (R. 140, 164). Thus, it is brought out strikingly that the petitioner is seeking to enforce the equivalent of the gold clause. This it cannot do, because it must rely upon an obligation payable in money of the United States and therefore dischargeable, dollar for dollar, in money of the United States.

Taking into consideration the foregoing economic conditions, legislation and proclamations, it may justly be concluded that the purpose of Congress in the Joint Resolution of June 5, 1933, was **to establish stability and uniformity, both domestically and in foreign exchange** and to avoid discrimination as between various classes of debtors and creditors. Congress fully appreciated that in reduc-

ing the gold content of the dollar there would be a proportionate increase in the value of foreign money in relation to United States money. It is apparent that the devalued dollar was to be legal tender in the discharge of all obligations. Let us pass to an examination of the language of the Joint Resolution.

(B) The Joint Resolution Provides That These Bonds Shall Be Discharged, Dollar for Dollar, in Any Coin or Currency of the United States Which at the Time of Payment Is Legal Tender, Irrespective of the Other Provisions for Payment or Discharge Contained in the Bonds.

The Joint Resolution is set forth in Appendix A to this brief. Paragraph (a) of Section 1 of the Joint Resolution, with the definitions appearing in paragraph (b) inserted in parentheses, reads as follows:

> "Every provision contained in or made with respect to any obligation (payable in money of the United States) which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency (of the United States), or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation (payable in money of the United States) hereafter incurred. Every obligation (payable in money of the United States), heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency (of the United States) which at the time of payment is legal tender for public and private debts."

It is submitted that since each of the First Terminal and Unifying Bonds is an "obligation," "payable in money

of the United States," as referred to in the second sentence of Section 1 of the Joint Resolution, each of said bonds is required to be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts, irrespective of the provisions for payment in Dutch guilders or other foreign moneys. Each of these bonds is required and permitted to be discharged in one thousand dollars of the present money of the United States.

1. The Word "Obligation," as Used in the Statute, Means the Bond or Coupon or Other Contract as a Whole, Rather Than Particular Provisions Contained Therein.

The word "obligation," as used in the statute, means the bond, coupon or other contract as a whole, as distinguished from "provisions" contained in such instruments (R. 141). This conclusion is evident from the language of the Joint Resolution, in the second paragraph of the preamble of which reference is made to "provisions of obligations." In the first sentence of subdivision (a) thereof the reference is to "every provision contained in or made with respect to any obligation." Manifestly, Congress was distinguishing between the **provisions** which may be contained in a bond, coupon or other obligation, and the bond, coupon or other **obligation itself**. It would be meaningless to refer to a "provision contained in an obligation," when the "provision" itself is the "obligation" in question.

This Court, in the cases that have come before it involving the Joint Resolution, has assumed that the word "obligation" referred to the bond or other contract, rather than to particular provisions or promises contained therein. Thus, in **Norman v. B. & O. Railroad Co.**, supra, the Court at page 313 referred to the "volume of obligations with gold clauses," and also said: "If there were no outstanding obligations with gold clauses * * *" and at page 315

said: "It is common knowledge that the bonds issued by these obligors have generally contained gold clauses, and presumably they account for a large part of the outstanding obligations of that sort." In **Perry v. United States**, 294 U. S. 330, at page 348, this Court, referring to a Liberty Bond issued by the United States, said: "The bond now before us is an obligation of the United States," and on the same page: "The bond in suit differs from an obligation of private parties, or of States or municipalities, whose contracts are necessarily made in subjection to the dominant power of the Congress." The dissenting judges in the **Gold Clause Cases** took no different view. At page 362 of 294 U. S., the dissenting opinion said: "By the so-called gold clause—promise to pay in 'United States gold coin of the present standard of value,' or 'of or equal to the present standard of weight and fineness'—found in very many private and public obligations, the creditor agrees to accept and the debtor undertakes to return the thing loaned or its equivalent." And, again, at page 368, the opinion reads: "Four causes are here for decision. Two of them arise out of corporate obligations containing gold clauses—railroad bonds."

"Obligation" is a word of several legal meanings and is often used in a sense which includes more than one of these meanings. The word may embrace the agreement, the duty of performing as agreed, and the written instrument of agreement. The **New English Dictionary (Oxford, 1909)** defines "Obligation," legally, as

> "An agreement, enforceable by law, whereby a person or persons become bound to the payment of a sum of money or other performance; a document containing such an agreement; especially in English law, a written contract or bond under seal containing a penalty with a condition annexed."

In **Munzinger v. United Press**, 52 App. Div. 338, 341, 65 N. Y. Supp. 194, 196, the court said:

> "The word 'obligation' originally meant a bond containing a penalty with a condition for the payment of money or to do or suffer some act or thing (Co. Litt. 172a). The meaning of the word, however, has gradually been enlarged by the courts, and it has ceased to be restricted to a bond or writing obligatory, and has been extended to mean a paper by which some fixed duty is assumed to be performed at a certain time, or an instrument in writing whereby one party contracts with another for the payment of money at a fixed date or for the delivery of specific articles. But however various have been the definitions given to the word, the one essential element has always been that it must be a written paper, the duty assumed by which must be a fixed duty (Bouv. L. Dict., title 'Obligation'; Sinton v. Carter Co., 23 Fed. 535; 17 Am. & Eng. Enc. of Law, 2, 3; Basehore v. Rhodes, 85 Penn. St. 44, 46; Strong v. Wheaton, 38 Barb. 616-624; State v. Campbell, 103 N. C. 344, 347)."

See, also, **Ballentine's Law Dictionary** (1930), p. 895.

It is not necessary to say whether Congress in the Joint Resolution used "obligation" as indicating the instrument or the duty arising from the instrument, and in fact the term was probably used in both senses. In any event, it is clear that the word "obligation" was used to mean the **whole** bond contract payable in United States money, as distinguished from provisions therein. This is indubitable. It follows from the very language of the Joint Resolution itself. "Obligation," as used in the statute, means the whole of any money contract and includes a provision in a money contract for a discharge of the obligation by delivery of gold bullion. It is not inconsistent with legal terminology for Congress to contemplate a single

obligation containing provisions for alternative performances. From 3 **Bouvier's Law Dictionary** (3rd Rev.), page 2393, we quote:

> "In order to constitute an alternative obligation it is necessary that two or more things should be promised disjunctively; where they are promised conjunctively, there are as many obligations as the things which are enumerated; but where they are in the alternative, though they are all due, there is but one obligation, which may be discharged by the payment of any one of them."

That the word "obligation" includes alternative promises was the express holding of this Court in **Holyoke Water Power Co. v. Paper Co.**, 300 U. S. 324, 337, where it is said:

> "But if both modes of payment had been preserved, the second equally with the first would have been effective to discharge the obligation."

The petitioner is patently wrong in its contention that the word "obligation" is restricted to a duty absolutely and solely payable in money of the United States. By its very terms and by the interpretation given it by this Court, the word includes such an obligation which contains also an alternative provision for performance. Petitioner argues that there was no obligation on June 5, 1933, when the Joint Resolution became effective, or indeed at any time prior to bankruptcy, because there was no absolute liability on the part of the Debtor to pay in dollars, pounds, marks, guilders or francs. Contrary to this suggestion, the obligation arises at the time of the promise, although liability for breach does not accrue until election. The distinction is expressed in **Williston, Contracts** (Rev. Ed., 1936), Section 44, page 129, as follows:

> "Sometimes this choice on the part of the promisee

must be exercised when the offer is accepted. In other cases the option need not be exercised until the time for performance of the contract. Such a choice is often given in regard to the time of performing a contract. So the place of performance, the quantity of goods to be sold or bought, the kind of goods, the method of shipment, or any other matter, may be left optional to the promisee. But though such promises may give rise to a binding **obligation** at the time of the promise, if consideration is given, no **liability** can arise for breach of them until the promisee exercises his option and gives notice of his choice to the promisor."

The use of the word "obligation" to include "debt" in this Court's opinion in **Holyoke Water Power Co. v. Paper Co.**, supra, is not improper, as in one sense "obligation" does include a "debt." It does not follow that its meaning generally, or as used in the Joint Resolution, is confined to "debt."

We submit that the District Court below correctly stated the law when it said that the word "obligation," as used in the Joint Resolution, refers to a bond or coupon of the character therein defined, as a whole, rather than to particular "provisions" contained therein (R. 141). The Circuit Court of Appeals assumed this to be true (R. 249). Petitioner admits that this use of the word is permissible (Brief, page 74). The plain meaning of the language used in the Joint Resolution makes such use of the word mandatory. Petitioner's contention (Brief, page 78) that no obligation was incurred defeats itself, for under this theory there would be no debt of any kind.

2. Bonds Are "Payable in Money of the United States," Within the Meaning of the Joint Resolution, If Payable in United States Money at the Unrestricted Election of the Obligee, Although the Obligee May Have the Option to Require an Alternative Performance in Gold, Foreign Moneys, or Other Commodities.

The Joint Resolution reaches the bonds in question because the obligation is "payable in money of the United States." The fact that it is also payable in other moneys does not remove it from the category of obligations "payable in money of the United States."

The District Court correctly said that the word "payable," as used in the Joint Resolution, and as applied to the Debtor's First Terminal and Unifying Mortgage Bonds, means "capable of being paid" (R. 141). The bonds are required to be paid in United States dollars, reserving an option in the holders of the bonds to elect to receive payment in guilders, francs, marks or pounds, and even if the dollar payment be considered as an option equal only in rank to the option to receive payment in the foreign currencies, the bonds are capable of being paid and the Debtor may be compelled to pay in money of the United States, and therefore they are "payable in money of the United States" within the meaning of the Joint Resolution.

When the word "payable" is used descriptively, it ordinarily means "capable of being paid," or "which may be paid." This adjective is constructed by the addition of the suffix "-able" to the verb "pay" and signifies "able to be paid."* **Webster's New International Dictionary** (G. & C. Merriam Co. 1933) contains the following definition of "payable":

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*The word "payable," notwithstanding that it sometimes acquires extra significance implied from the circumstances of its use, basically is a descriptive word, one of that group of adjectives formed by the addition of the suffix "-able" to a verb form. Such adjectives denote that the

"Payable: 1 That may, can, or should be paid; justly due. 2 **Law.** a That may be discharged or settled by delivery of value. b That is to be paid (by any particular person); as, bills **payable**; also matured or maturing; due."

Funk & Wagnalls' New Standard Dictionary (1913) defines "payable" as follows:

"Payable. 1 Due and unpaid; capable of being discharged by payment; that can or will be paid; justly due; due as to time; as, the note is payable today."

In 22 **Am. & Eng. Enc. of Law** "payable" is defined:

"The word 'payable' is a descriptive word, meaning capable of being paid; suitable to be paid; admitting or demanding payment; justly due; legally enforceable."

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noun referred to is capable of being acted upon in the designated way. Thus "payable" ordinarily means "capable of being paid." Adjectives ending in "-able" are discussed in **Poutsma, A Grammar of Late Modern English** (Groningen, 1926), Part II, Sec. II, pp. 135, 136, as follows:

"**Passiveness expressed by other means than the Passive Voice.**

"Besides the passive voice the language has several other constructions representing a person or thing as subjected to an activity. * * *

"The force of the passive voice, its power, that is, of representing a person or thing undergoing an activity, may also be traced, in a modified way, in adjectives ending in **able** (or **ible**), the modification consisting in the additional notion that the person or thing referred to may (or should) undergo the action suggested by the adjective. Thus **the fruit is eatable** is approximately equivalent to **the fruit may be eaten** or **is capable of being eaten. The tree is discernible from a fair distance** is practically the same as **the tree may or can be discerned from a fair distance.** In like manner **such actions are highly blam(e)able** may be replaced by **such actions should be highly blamed** or **are to be highly blamed.** Only **able** is a living suffix, being freely employed to form new adjectives."

The suffix "-able," "-ible" or "-ble" is defined in **Webster's New International Dictionary (1932)** as:

"An adjective suffix used: (a) Passively with implication of ability, fitness, or worthiness to be acted upon, as **eatable**, fit to be eaten; **lovable**, worthy to be loved; **readable**, possible to be read. This is now the usual sense of the suffix in English. (b) In the sense of **tending to, given to, favoring, causing, able to,** or **liable to,** as **peaceable**, given to peace; **perishable**, liable to perish; **terrible, horrible, delectable, durable.** Words like **mutable**, tending to change, also able to be changed, have both the active and the passive senses."

The same definition appears in 6 **Words and Phrases,** 1st Series, 5245, citing **First National Bank v. Greenville National Bank,** 84 Tex. 40, 19 S. W. 334, 335. See also **Gulf Production Co. v. Cruse** (Tex.), 258 S. W. 211, 212.

The closest cases which we have found are those dealing with the requirement of the law merchant that a bill or note to be negotiable must be payable in money, and holding that this requirement is met where the instrument is dischargeable in money or by some other performance at the option of the holder.

In **Hosstatter v. Wilson,** 36 Barbour (N. Y.) 307, it was held that an instrument whereby a maker promises to pay a specified sum, or in goods on demand, was payable in money, the court expressing its holding as follows:

> "The essential requisite of a promissory note is that it must be payable in money absolutely and without any contingency * * *. In the present case the debtor promises to pay in money. He has no election to do anything else. If the holder chooses he may surrender the note and receive goods, but that rests entirely with himself and no choice is left to the debtor."

The New York Court of Appeals held to the same effect in **Hodges v. Shuler,** 22 N. Y. 114. This Court came to a like conclusion in **Hotchkiss v. National Bank,** 21 Wall. 354, 358.

It is true that where in a money contract it is stated that money is payable in some particular place or at some particular time, the courts hold that such particular place or time of payment is mandatory. These holdings are to the effect that when the word "payable" is used in a commercial sense it means that which is to be paid, rather than that which may be paid. It does not follow from this that it is a misnomer to say that a contract is payable in one of several ways, or that when the word "payable"

is used in a descriptive sense it does not include that which is capable of being paid as well as that which must be paid. The distinction is well put in **First National Bank v. Greenville National Bank,** 84 Tex. 40, 19 S. W. 334, 335, where it is said:

> "The word 'payable' is a descriptive word, meaning 'capable of being paid; suitable to be paid; admitting or demanding payment; justly due; legally enforceable' (Webst. Dict.) * * *. It becomes a promise to pay only when used in connection with words showing an obligation to pay."

The word "payable," as used in **Johnson v. Dooley,** 65 Ark. 71, 44 S. W. 1032, 1033, referred to the only medium of payment prescribed. There was no optional method of payment, and, therefore, this definition cannot apply to the instant case. In fact, the court in that case pointed out that the promise there involved was to pay in specific bonds, and that there was not a "mere privilege or option to pay in bonds." That is an indication that the court would have decided the case differently had an option existed. The **Johnson** case was cited with approval in **Poppleton v. Jones,** 42 Ore. 24, 69 Pac. 919, 922, which was a similar case involving no optional method of payment.

As to time of payment of a negotiable instrument, it has been held that "payable" means "to be paid." In the case so defining the word, the court said further: "If a negotiable instrument is payable at one of two banks, it may be presented for payment to either." **Farmers Bank v. Johnson, King & Co.,** 134 Ga. 486, 68 S. E. 85. It would seem to follow that if an instrument is payable in one of two (or more) currencies, it may be paid in either.

Petitioner (Brief, page 75) cites **Swanson v. Spencer,** 177 Mo. App. 124, 163 S. W. 285, in support of its view

as to the meaning of the word "payable." The clause involved there was "due and payable," and the court, in arriving at the definition of this phrase, considered the respective meanings of the two words and also the "modifying effect of their conjunction to express a composite idea." The definition given there to the word "payable" was limited to its combination with the word "due," which the court found to mean, in that case, that a present right existed in the obligee to enforce payment and a present right in the obligor to discharge the debt by payment. In other words, the phrase used there meant "accrued."

In **Ingram v. Mandler**, 56 F. (2d) 994 (C. C. A. 10), also cited by petitioner, the phrase construed was one appearing in certain notes and reads as follows:

> "Privilege granted to pay note in full on 1st day of June or December of any year before maturity, the interest on this note being payable on said dates."

There was no optional payment involved, and the definition given cannot apply to the case at bar. The court construed the word in its commercial sense in connection with a clause which clearly required construction of "payable" as meaning "to be paid."

There is a measure of irony in the contention of the petitioner that the bonds are not payable in money of the United States when the very indenture under which the petitioner is claiming provides that all bonds issued under the indenture are to be so payable (R. 130, 18, 39).

In construing the language of the Joint Resolution as applied to bonds containing a multiple currency clause, Mr. Justice Rosenman said in **Zurich General Accident & Liability Ins. Co., Lim., v. Lackawanna Steel Co et al.,** 164 Misc. 498, 299 N. Y. Supp. 862, affirmed 254 App. Div.

839, reversed, New York Court of Appeals, January 11, 1939:

"The Joint Resolution by its very terms covers 'every obligation,' which is defined as 'every obligation payable in money of the United States.' This language is broad enough to cover these coupons, even though they are alternatively payable in other currencies. If one alternative method of payment is proscribed by the statute expressly, the entire obligation is covered, even though the other alternative may not itself be specifically banned. This is the rule which has been applied to situations where an agreement is framed in the alternative and one of the alternatives is subject to the statute of frauds. The statute is deemed in such cases to include the entire obligation, so that both alternatives contained in the obligation are considered unenforceable. De Beerski v. Paige, 36 N. Y. 537. The same principle should be applied to the analogous situation here under consideration."

But need we look farther than the decision of this Court in **Holyoke Water Power Company v. Paper Co.**, 300 U. S. 324? We think not. There we find facts almost identical in this respect to those here present. The leases there involved called for payment of "a quantity of gold which shall be equal in amount to fifteen hundred ($1500) dollars of the gold coin of the United States of the standard of weight and fineness of the year 1894, or the equivalent of this commodity in United States currency." These leases were held to have been reached by the provisions of the Joint Resolution. The only conclusion that can be drawn from the decision is that this Court without doubt considered "payable" to mean "capable of being paid." There payment in currency was one alternative; payment in coin or bullion was another. On this point this Court said (l. c. 337):

policy of the United States in reference to obligations then outstanding and those thereafter incurred. By words of inclusive character Congress undertook to deal with **any** obligation payable in money of the United States and to provide for the discharge of **every** obligation payable in money of the United States. It is inadmissible to limit the application of the Joint Resolution to obligations payable in money of the United States only. The very reason for the Joint Resolution was to deal with obligations payable in a specified amount of money of the United States which also contained provisions attempting to confer additional rights upon obligees. By the attempted exercise of the option for payment in foreign moneys after June 5, 1933, the holders of the bonds cannot avoid the fact that on June 5, 1933, the Joint Resolution applied to the bonds as obligations payable in money of the United States, and consequently directed the method of their discharge.

The option contained in the bonds became inoperative on June 5, 1933, which was the effective date of the Joint Resolution, and the purported election (whether or not the petitioner, as trustee, had the power to make an election) on a date subsequent to June 5, 1933, was and is wholly ineffective and without any force or effect (R. 142). The bonds on June 5, 1933, were payable in money of the United States and the Joint Resolution on that date directed that all obligations then so payable should be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. This declaration of the public policy of the United States may not be avoided or defeated by a subsequent purported election to receive payment in a currency other than money of the United States.

It is submitted that this Court will not be disposed to interpret the Joint Resolution to defeat its application to a contract of this kind which would differ only verbally

from the more conventional gold clause. We believe that the true construction is that any contract which gives the creditor an unqualified right to receive money of the United States is within the scope of the Joint Resolution. This accords with the conclusion of the New York Appellate Division in **City Bank Farmers Trust Co. v. Bethlehem Steel Co.**, 244 App. Div. 634, 280 N. Y. Supp. 494, 496, which was that:

> "The bonds and coupons which were issued by the appellant are obligations payable in money of the United States. While they provide for payment in sterling or guilders, they are, nevertheless, within the spirit and intent of the joint resolution."

It cannot be assumed, as petitioner assumes, that Congress deliberately refrained from mentioning foreign currency options in its legislation for the reason that they are a matter of "no particular consequence" (Brief, page 59), an argument in which it still persists in the face of the conclusive answer thereto by this Court in the passage from **Holyoke Water Power Co. v. Paper Co.**, quoted infra. In the first place, we say that **the Joint Resolution does reach these bonds.** As stated by the District Court, the Joint Resolution deals with obligations payable in a specified amount of money of the United States which also contain provisions attempting to confer additional rights upon obligees, and the application of the Joint Resolution is not limited to obligations which can be paid only in money of the United States.

In addition, it must be recognized that **the multiple currency options have the same effect as the gold clauses.** There was as much reason to cover obligations containing such options (if they were payable also in United States money) as there was to cover gold clause obligations. Why, we ask, would Congress pass over this class of obli-

gations as a matter of "no particular consequence," when the effect of payment in certain foreign moneys would be the same as that of payment under the gold clause?

Petitioner states that the Joint Resolution should be strictly construed and not in a manner raising doubts as to its constitutionality. This Court has upheld the constitutionality of the Resolution in the **Norman** case. In the **Holyoke** case this Court has said how the Resolution is to be construed. "We must consider the situation of the parties, their business needs and expectations, in gauging their intention," said the Court. We must consider "the evil to be remedied." That evil was correctly described by the Circuit Court of Appeals in the opinion below in the case at bar, when it said:

> "In short, the evil struck at by the Resolution was contract provisions purporting 'to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby'—as defined in paragraph (b), 'payable in money of the United States.' The reason why this is an evil and the reason for preventing it being to prevent obstruction of the maintenance of the equal value of the various United States moneys 'in the markets and in the payment of debts.' "

Petitioner argues that the preamble of the Joint Resolution restricts the general language of the enacting part of the statute. The preamble to legislation may be consulted to explain ambiguous terms in the statute, but not to control a clear direction of the enacting part of the statute. **Yazoo v. Thomas**, 132 U. S. 174, 188. It is not admissible to ignore the second sentence of the Joint Resolution because the contents thereof are not recited in the preamble to the Joint Resolution. However, we do not agree with petitioner that the preamble does not touch our case. The

petitioner is in fact seeking to recover an amount of United States money measured indirectly by United States gold coin of the standard of weight and fineness existing in 1912. The preamble recites that the existing emergency had disclosed that provisions of obligations purporting to give the obligee the right to require payment in an amount of money of the United States measured by United States gold coin obstructed the power of Congress to regulate the value of the money of the United States. In our case the 2,490 guilders called for by the guilder option were specified in the indenture as the equivalent of $1,000 in United States gold coin, and the petitioner is seeking through the enforcement of the foreign money option to assert a claim in an amount of money of the United States measured by the equivalent of United States gold coin of 1912. Naturally, the preamble did not attempt to specify how the evils recited were to be met, but that was left to the enacting part of the statute. The first sentence of the enacting part of the statute proscribed certain specified types of provisions. The second sentence thereof directed the discharge of **all obligations** payable in money of the United States, whether or not provisions of the particular proscribed type were included therein. By this sentence in the enacting part of the statute Congress reached cases where the mischief recited in the preamble was accomplished indirectly rather than directly. As indicated by the Circuit Court of Appeals in its opinion below, the preamble clearly contemplates the striking down of foreign money option clauses when they operate to preserve to the creditor the equivalent of United States gold coin (R. 251).

Petitioner makes the criticism that under the interpretation of the Joint Resolution adopted by the courts below the Joint Resolution would direct the discharge of all kinds of extraneous promises which might be inserted in a bond or note. This is not a just criticism. Under the

> "Payment in currency, quite as much as payment in coin or in bullion, was not only performance under the law, but performance under the contract, provided only that the value of the currency was equal, when paid, to the value of the gold."

In the instant case (assuming, for the purpose of this argument, that the primary obligation was not one for payment in United States money, but that such money was only one equal alternative medium of payment) we find provision for payment under a currency option clause. Substituting words to fit this case for those used by this Court in the above quotation:

> "Payment in dollars, quite as much as payment in guilders, was not only performance under the law, but performance under the contract * * *."

The fact that in the **Holyoke** case the option was in the obligor instead of in the obligee, as here, does not alter this situation, for if "payable" means "to be paid" in one case, it means "to be paid" in the other. By implication this Court has defined "payable" to mean "capable of being paid" in the **Holyoke** case. It can have no different meaning as applied to the option clause of the First Terminal and Unifying Bonds.

"Payable," as used in the Joint Resolution, and as applied to the option clause in these bonds, must mean "capable of being paid." It has been so construed by this Court in an analogous situation. The cases holding that it means "which must be paid" or "to be paid" do not have to do with cases involving an optional medium of payment and cannot, therefore, be regarded as authority in a case involving such an option. The argument that "payable," as used here, means obligatory payment in all events goes too far, for, under this view, if the option for some reason cannot be exercised, the bonds containing the option clause would never be payable. The Circuit Court

of Appeals in its opinion below found that the word "payable" is, standing alone, ambiguous, and that it could mean "must be paid" or could mean "capable of being paid" (R. 249). It therefore looked to the Joint Resolution as a whole, including the preamble, and to the evil to be remedied, to determine in what sense the word "payable" was used in the Joint Resolution. It concluded, for the reasons which it expressed in its opinion, that in the Joint Resolution the word "payable" means "capable of being paid."

The cases and Harvard Law Review article cited by petitioner do not apply to these bonds, especially in view of the language of this Court in the **Holyoke** case: "The obligation was one for the payment of money. * * * Weasel words will not avail to defeat the triumph of intention when once the words are read in the setting of the whole transaction." Here the intention is clear; **weasel words will not avail to defeat it.**

3. Every Obligation Payable in Money of the United States Is to Be Discharged Upon Payment, Dollar for Dollar, in Current Legal Tender, Irrespective of the Other Provisions Contained Therein, and the Joint Resolution May Not Be Confined to the Invalidation Alone of the Conventional Gold Clause.

The Joint Resolution applies to every obligation which was payable in money of the United States on the date of the passage of the Resolution. A bond payable in money of the United States, containing an option for alternative payment in gold or foreign money, is payable in money of the United States. On June 5, 1933, the effective date of the Joint Resolution, the options for payment in other than United States money had not been exercised; and the bonds come literally within the description of obligations reached by the statute. The Joint Resolution declared the public

lower courts' conclusions, any money contract which was capable of being discharged in United States gold coin or prescribed equivalents thereof might be discharged in United States legal tender. Extraneous promises upon an independent consideration would not be affected.

Petitioner gives us the basis for its restricted view of the Joint Resolution when it says (Brief, page 57) that the Joint Resolution was brought into being solely because of the shortage of gold. As a preliminary to the discussion of the interpretation of the Joint Resolution, supra, it has been shown that Congress was alive to the necessity of reducing the value of the dollar so as to raise prices generally, and particularly to increase the values of foreign moneys.

It is argued that the Joint Resolution could not be given extraterritorial effect and that the place of performance in respect to the payment of guilders is not within the United States. But the domicile of the Debtor and the property securing the bonds are within the United States, the bonds were issued and sold in this country, the petitioner is an American corporation, this claim is presented on behalf of American owners, and recourse is made to an American court for the allowance of the claim. The Joint Resolution is by its terms a declaration of public policy. The presumption against extraterritorial construction of a statute does not preclude a state or country from enforcing its rule of public policy where resort is had to its courts to enforce the obligations of its citizens. **Union Trust Co. v. Grosman**, 245 U. S. 412, 416; **Oceanic Steam Navigation Co. v. Corcoran**, 9 F. (2d) 724, 731 (C. C. A. 2, 1925).

We cannot improve upon the reasoning of the Circuit Court of Appeals in the opinion below concerning the impropriety of applying foreign law in order to defeat the declared public policy of this country. That court said (R. 253):

"* * * the holder is secured from depreciation of the gold dollar not only by a gold clause provision, but by a fourfold further assurance in these foreign currencies of values based on the specified gold dollar. Thus by running around an international stump—passing through Holland en route—the holder of every bond and coupon enriches himself substantially at the expense of the debtor and of other creditors. Here, the same result (with further saving of exchange charges) is reached merely through a formal demand in Holland for payment (known to be futile) and by a simple mathematical calculation. Also, this in a situation where no payment is possible, but where the above advantage will increase the indebtedness of the debtor, and, therethrough, the participation of these holders in the property reorganization at the expense of every other person financially interested in that property.

"Such a result would be squarely within a situation similar to that expressed by the Chief Justice in outlining the effect of devaluation of the dollar (Norman v. B. & O. R. Co., 294 U. S. 240, 315). Clearly, such result so reached would interfere with the purpose of the Joint Resolution (expressed in its title) 'To assure uniform value to the coins and currencies of the United States' which was to be accomplished through enforcement of 'the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts' by striking down all private obligations requiring payment in a particular kind of coin or currency. In short, the evil sought to be avoided by the Resolution is accomplished by a form of indirection and, to that extent, the purposes of the Resolution and, therefore, the Resolution itself defeated. We think such a result brings these instruments within the intendment of the Resolution and within the ambiguous expressions, set out hereinabove, of the Resolution. The vice of these instruments, in view of the Resolution, is that they provide for payment in gold dollars of a specified

weight and fineness or, optionally with the holders, in foreign currencies, the amount or value of which is based upon that gold dollar."

The New York Court of Appeals had no difficulty in applying the Joint Resolution in a suit brought in a New York court, although between citizens of foreign countries, in **Compania de Inversiones Internacionales v. Industrial Mortgage Bank of Finland**, 269 N. Y. 22, certiorari denied 297 U. S. 705, saying at page 31:

> "The Joint Resolution has thus revealed clearly the intention of the Congress to regulate the kind and amount of the currency wherewith the obligation may be discharged, as a matter of public policy in this jurisdiction. **The parties to a contract may not by their intention, however expressed, override the laws of the country in which suit is brought when a matter of the public policy of that country is involved. Even comity with the laws of another jurisdiction never extends to the enforcement of a law of that jurisdiction which violates a positive law of the country wherein suit is brought and is contrary to its public policy** (American Law Institute, Restatement of Conflict of Laws, p. 440; De Beeche v. South American Chilean Stores, etc. [1935], A. C. 148). Consequently it becomes immaterial whether the obligations of these bonds would otherwise be governed by some foreign law."

We submit that in the first sentence of paragraph (a) of the Joint Resolution Congress dealt with particular "provisions" contained in "obligations." But Congress was not content only to strike down particular "provisions." It desired that the effect of the statute should be as broad as its purpose, viz., to deal with "any obligation," "heretofore or hereafter incurred," "whether or not any such provision is contained therein or made with respect thereto." All such obligations were to be dis-

charged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender. A legislative draftsman would be at a loss to suggest language more apt to show the all-inclusive character of the statute's application to **obligations.**

The object sought to be accomplished by Congress in its monetary legislation will be effectuated if the Joint Resolution is given the application for which we contend. The spirit as well as the letter of the statute will be made effective. The objective of Congress will be defeated, as applied to this particular situation, if the Joint Resolution is found not to apply to bonds carrying foreign money option clauses of the kind here involved.

4. A Review of the Authorities Dealing With the Joint Resolution Pertinent to Obligations Containing Foreign Money Options Indicates That the United States Supreme Court Decisions Support the Decision Below, and That the Holdings of Other Courts Are Divided.

Having considered the application of the Joint Resolution to the First Terminal and Unifying Bonds as a matter of principle, we come now to a review of the cases dealing with the issues involved.

(a) Supreme Court Decisions.

1. **Norman v. B. & O. Railroad Co.**, 294 U. S. 240, decided February 18, 1935. This Court in this case sustained the constitutionality of the Joint Resolution. The Court held that gold-clause obligations which purported to require the debtors to pay an increased amount of currency, after the devaluation of the dollar, were such an obstacle to the exercise of the constitutional power of Congress to regulate the value of money that it was competent for Congress to enact the Joint Resolution of June 5, 1933. In the course of the opinion Mr. Chief Justice Hughes pointed

out the dislocation of the domestic economy which would be caused by the disparity which would result from debtor railroads receiving their rates, fares and charges in the depreciated dollar and being compelled under gold clauses to pay $1.69 in currency for every dollar which they had borrowed.

It may be noted here that this Court in that case (page 302) and subsequent cases (see **Smyth v. United States**, 302 U. S. 329, 361) has concurred in the interpretation of the English House of Lords in **Feist v. Societe Intercommunale Belge d'Electricite**, L. R. (1934) A. C. 172, 173, that the conventional gold clause is to be taken as a "gold value" undertaking to pay in gold dollars of the specified weight and fineness or their equivalent in lawful currency. The importance of this, in this connection, lies in that the Joint Resolution is found to condemn the gold clause in the aspect in which it requires payment of an increased amount of currency as well as in the aspect of requiring actual gold coin.

2. **Holyoke Water Power Co. v. Paper Co.**, 300 U. S. 324, decided March 1, 1937. This case dealt with a lease which provided that the grantee should yield and pay to the grantor as rent "a quantity of gold which shall be equal in amount to fifteen hundred ($1500) dollars of the gold coin of the United States of the standard of weight and fineness of the year 1894, or the equivalent of this commodity in United States currency." The lessor contended that payment should be made under the lease for as many ounces of gold as were contained in the stipulated gold dollars. The lessee contended that it could discharge the rental by the payment in United States lawful tender of the number of dollars mentioned. This Court held for the lessee on the ground that the contract was "within the letter of the Joint Resolution of June 5, 1933, and equally within its spirit."

This Court in the first numbered paragraph of the opinion determined (page 335):

> "The obligation was one for the payment of money, and not for the delivery of gold as upon the sale of a commodity.
>
> "The lessor was a water power company, engaged in that business and not in any other. There is no pretense that it was stipulating for gold to be used in art or industry. What it wished was currency, or bullion susceptible of being converted into currency, the lessee to make the choice. The alternative forms of payment shed light upon each other."

In the second numbered paragraph of the opinion the Court considered the spirit and intent of the Joint Resolution, saying at page 337:

> "A contract for the payment of gold as the equivalent of money, and a fortiori a contract for the payment of money measurable in gold, is within the letter of the Joint Resolution of June 5, 1933, and equally within its spirit."

And further on, at page 339, the Court said:

> "As definitely, indeed more obviously, the evil includes transactions whereby a debt is to be discharged, not in bullion, but in dollars, if the number of the dollars is to be increased or diminished in proportion to the diminution or the increase of the gold basis of the currency."

Previously, under the first numbered paragraph of the opinion, page 335, it had observed:

> "We must consider the situation of the parties, their business needs and expectations, in gauging their intention. When these are kept in view, the gold is seen to be a standard with which to stabilize the value of the dollar; the dollar not a yardstick with which to measure the quantity of the gold. To read the

leases otherwise is to permit the realities of the transaction, its substance and essential purpose, to be obscured by forms and phrases. Long ago it was said by a distinguished member of this court, commenting upon a different statute, but one analogous in purpose: 'If the contract is for the delivery of a chattel or a specific commodity or substance, the law does not apply. If it is bona fide for so many carats of diamonds or so many ounces of gold as bullion, the specific contract must be performed (assuming, of course, that contracts for the delivery of bullion are not prohibited by law). But if terms which naturally import such a contract are used by way of evasion, and money only is intended, the law reaches the case.' Per Bradley, J., in The Legal Tender Cases, 12 Wall. 457, 566. **Here what was intended was to assure the payment of a money debt in dollars of a value as constant as that of gold.** Norman v. Baltimore & Ohio R. R. Co., supra, p. 302; cf. Feist v. Societe Intercommunale Belge D'Electricite (1934), A. C. 161, 172, 173. The fact is of little moment that currency is characterized as a commodity in the verbiage of the covenant as long as it is currency. Cf. Lipke v. Lederer, 259 U. S. 557, 561, 562. Weasel words will not avail to defeat the triumph of intention when once the words are read in the setting of the whole transaction. So read, the end to be achieved is shown forth unmistakably as a payment, not a sale."

In the third numbered paragraph of the opinion, pages 339 and 340, this Court found the conclusion to follow that the obligation under consideration should be discharged, dollar for dollar, in United States legal tender, saying: " 'Dollar for dollar,' the obligation for the payment of money conforming to the standard of the covenant is to be discharged with money of the standard established by the law."

In the fourth numbered paragraph of the decision this

Court answered a contention to the effect that Congress lacked the constitutional power to deal with contracts, which, because of their smallness in number, did not seriously affect its power to regulate money, saying at page 341:

> "No principle of constitutional law, no dictate of fair dealing, lays a duty upon the Congress to single out for special treatment an individual or a few among the members of a common mass. Cf. Purity Extract Co. v. Lynch, 226 U. S. 192, 201. One cannot even say with reason that the effects of this particular covenant are to be classified as negligible. The lessee as the recipient of principal or income must accept payment from its debtors in the depreciated currency. It is injured, at least appreciably, if it is required to pay its creditors in dollars of a different standard. Norman v. Baltimore & Ohio R. Co., supra, p. 315. Receipts and disbursements are no longer on a common basis."

The passages quoted from this recent decision of this Court are applicable to this case. In considering the circumstances surrounding the issuance and sale of these bonds to Americans (R. 160), we do not find a sale or purchase of foreign money. A domestic holder did not purchase the bonds with guilders, and he was concerned with the repayment of principal loaned in United States money and with the earning of interest thereon. It is also true in this case that the claim sought to be established by the petitioner is in a number of United States dollars, increased in proportion to the diminution of the gold basis of the United States currency.

The paramount importance of the **Holyoke** case as a precedent in the instant case lies in its holding that an obligation, dischargeable in one alternative in gold bullion (a promise which standing alone is not affected by the Joint Resolution), is brought within the Joint Resolution because

money option provisions contained in such obligation. Interest coupons of the Bethlehem Steel Company provided for payment in United States gold coin, or, in the alternative at the holder's option, in Dutch guilders. Action was brought by a domestic holder for the value of the guilders specified in the coupons. The court did not allow recovery of the dollar equivalent of the guilders. It held, relative to such obligations, that "The bonds and coupons which were issued by appellant (Bethlehem Steel Company) are obligations payable in money of the United States," and it pointed out that where domestic holders of bonds and coupons were concerned they were also "within the spirit and intent of the joint resolution," saying:

> "It is not contended by the appellant that the holders of these coupons, who are subjects of England and Holland, respectively, are governed by the terms of the joint resolution. In fact, the affidavits show that all payments have been made to bona fide holders in foreign countries in accordance with the terms of the agreement. It is claimed, however, and rightfully so, that the citizens of our country are controlled by the terms of the joint resolution, particularly where, as here, the bonds were purchased in the United States by citizens thereof, and the parties who purchased them expected to be paid in dollars, the value of which was not to be governed by the currency of any other country. It would be exceedingly unjust to compel the appellant to meet its obligations on the basis of the old standard, when the entire income from its business is received in the existing currency."

From these premises the conclusion followed that the coupons were to be discharged in United States legal tender, dollar for dollar, as provided by the second sentence of Section 1 (a) of the Joint Resolution, the court remarking:

"That portion of the joint resolution which is par-

ticularly applicable to this case reads as follows: 'Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts.' "

2. **Anglo-Continentale Treuhand, A. G., v. Southern Pacific Company**, by the Appellate Division, First Department, of the Supreme Court of the State of New York (June 12, 1937), 251 App. Div. 803, 298 N. Y. Supp. 181, unanimously affirming, without opinion, decision of the New York Supreme Court for New York County, by Mr. Justice Valente, 165 Misc. 562, 299 N. Y. Supp. 859. This action was brought by an European corporation for the guilder value of coupons payable in United States gold coin, or, at the holder's option, in guilders. The court sustained the sufficiency of an answer based upon the Joint Resolution which alleged that the domestic owner of the bonds had transferred the coupons containing the guilder option to the foreign corporation for the purpose of evading the Joint Resolution, and that consequently the coupons should be discharged, dollar for dollar, in United States currency.

3. **Zurich General Accident & Liability Insurance Co., Lim., v. Lackawanna Steel Co. et al.**, a decision in the New York Supreme Court for the County of New York by Mr. Justice Rosenman, 164 Misc. 498, 299 N. Y. Supp. 862, affirmed sub. nom. **Zurich General Accident & Liability Insurance Co., Lim. v. Bethlehem Steel Co.**, 254 App. Div. 839, 6 N. Y. Supp. (2d) 139, reversed, New York Court of Appeals, January 11, 1939. In an action for the Swiss franc value of coupons payable in United States gold coin, or, at the option of the holder, in Swiss francs, by foreigners who acquired their bonds after the adoption of the

case the plaintiff, a corporation of the Principality of Liechtenstein, in Europe, owned thirty-six of the First Terminal and Unifying Bonds herein concerned. After presenting the coupons appurtenant to these bonds in Amsterdam on their maturity date and not receiving payment thereof in guilders, it brought suit to recover the value of the guilders called for by the coupons. Upon the pleadings and affidavits, summary judgment in favor of the plaintiff was directed, in accordance with the New York practice, for the guilder value, and this was affirmed by the Circuit Court of Appeals for the Second Circuit, and certiorari was denied by this Court. The case is a holding by the Second Circuit that a foreign holder of bonds and coupons, no matter when acquired, may recover judgment in American courts for the value of foreign moneys called for by foreign money options contained in the coupons. The opinion makes clear, however, that the court did not regard the nationality of the owner of the bonds as important.

A careful study reveals that the Second Circuit Court of Appeals based its conclusion that the Joint Resolution did not apply upon two principal premises.* The first premise

*Unfortunately for the clarity of the opinion the court, by some inadvertence, misstated the question for decision in the third sentence from the end of the first paragraph of the opinion. It stated: "The only question is whether the damages recoverable in dollars in this action are to be calculated at the gold par of the guilder, or at the rate of exchange prevailing in New York at the time of judgment." In fact there was only a slight variance between the gold par of exchange in the years 1934 to 1936, i. e., $.680567 (R. 168), and the exchange value of the guilder then current. Any substantial variation would have been corrected by the shipment of gold. This inadvertence led to the absurd summary of the decision in the syllabus to the effect that the court held that damages should be recoverable calculated at the gold par of the guilder and not at the prevailing rate of exchange in New York. Of course, it is elementary that the value of foreign moneys is determined at the exchange rate at the date which is deemed important by the Court, and never at its nominal par. 48 C. J. 606; Sutherland v. Mayer, 271 U. S. 272, 295. This error has been carried forward by the New York court of Appeals in its opinions of January 11, 1939, where it said "That Court decided that damages recoverable in dollars were required to be calculated at gold par of the guilder and not at the rate of exchange prevailing in New York at the time of the judgment."

was that the effect of the Joint Resolution was limited to a proscribing of the provisions mentioned in the first sentence of the enacting clause thereof. This is implicit from the following statement of the court in the second paragraph of the opinion:

> "still it is a plausible, though to us not a persuasive, argument that 'obligation' means the instrument itself and that the resolution therefore covers all instruments which contain a promise to pay money of the United States. That would put these bonds within the resolution as to the promise to pay dollars in gold, as of course they are, but it does not advance the defendant's case a whit as to the other promises. They are within the resolution only in case its terms cover them, which they do not. It only proscribes a 'provision' which 'purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured' by either. Since, as we have seen, the promise to pay guilders did not 'purport * * * to require payment in gold,' the resolution does not hit it."

With this language the court concluded its statement of the reasons why the language of the Joint Resolution did not hit the coupons in question. The opinion can be searched and no reference can be found to the second sentence of the enacting clause of the Joint Resolution. The court failed to perceive that if it had yielded to what it termed the plausible but not persuasive argument that "obligation" included the coupon as such, such coupon became dischargeable, dollar for dollar, in United States legal tender by reason of the express command of the second sentence of the Joint Resolution.

The second premise of the opinion was that the application of the Joint Resolution should be determined by consideration solely of the written face of the contract, and

of the other alternative for payment of money, and because under the circumstances the obligation was plainly a money contract.

Petitioner urged below that the **Holyoke** case is to be distinguished from the instant case because in the **Holyoke** case the option was in the promisor, whereas in this case it is in the promisee. To us the case for an obligation being payable in money of the United States, so as to be reached by the Joint Resolution, is much stronger when the option is in the promisee. In such situation the obligee has a legally enforceable right to require United States money in payment. The Joint Resolution is directed to situations where a creditor has provided by contract for protection from the debtor against a reduction in the value of the dollar and ordinarily such protection will be secured through giving the option to the promisee in the case of an alternative contract.

This Court in the **Holyoke** case viewed the fact that the option was in the promisor to deliver gold, or the value of gold in money, as evidence showing that the promisee was not desirous of gold as a commodity. In the instant case we have other circumstances showing that the bondholders were not desirous of receiving guilders as such, but instead sought to be assured that the dollars which they would ultimately secure as a result of performance by the Debtor would have a value as great as the gold coin dollars mentioned in the bond contract.

(b) Decisions of New York State Courts.

The New York Court of Appeals on January 11, 1939, decided the appeals in the cases of **Zurich General Accident & Liability Insurance Co., Lim., v. Bethlehem Steel Co.**, 254 App. Div. 839, 6 N. Y. Supp. (2d) 139, and **Anglo-Continentale Treuhand, A. G. v. Bethlehem Steel Co.**, 254

App. Div. 844, 6 N. Y. Supp. (2d) 334, presenting the question as to the application of the Joint Resolution to coupons payable in money of the United States and also payable, at the option of the holder, in specified foreign moneys, and owned by foreigners. The Court of Appeals, by a five-to-two decision, decided that the Joint Resolution did not apply to the foreign money options there involved under the facts of those cases.

In the short opinions in these cases the New York Court of Appeals merely announced its conclusions based upon the facts before it in those cases.

The rationale of that court's decisions is not disclosed by the opinions, but the repetition in each opinion that the decision was "on the facts of this case," the failure to overrule expressly the Appellate Division decision in **City Bank Farmers Trust Company v. Bethlehem Steel Company**, 244 App. Div. 634, 280 N. Y. Supp. 494, where domestic coupon holders were involved, and the omission of any statement of dissent from the decision below in the case at bar, justify the conclusion that the decisions were confined to the facts of the particular cases. Because these cases are to be argued before this Court after the instant case, we refrain from an extended discussion of the opinions of the New York Court of Appeals.

At this time we review the decisions of the New York Supreme Court and New York Appellate Division, First Department, which were in general accord with the contentions of the respondents in respect to the application of the Joint Resolution to bonds of this character.

1. **City Bank Farmers Trust Co. v. Bethlehem Steel Co.**, 244 App. Div. 634, 280 N. Y. Supp. 494, decided May 31, 1935. In this case there was squarely presented the right of an American citizen to recover judgment for an amount in excess of the United States money face of an obligation payable in money of the United States because of foreign

Joint Resolution, the Supreme Court in New York sustained a defense based upon the Joint Resolution. The reasoning of Mr. Justice Rosenman is strikingly parallel to that of Mr. Justice Cardozo in the **Holyoke** case, supra. In this case, which is one of the most fully reasoned expressions upon this subject, Justice Rosenman said:

> "An analysis of the Joint Resolution will disclose that it relates to two independent subjects, both of which may or may not be included in any one particular instrument.
>
> "It relates to every '**obligation**' payable in money of the United States. It relates also to '**provisions**' in **any** obligation which give the obligee a right to demand payment in gold.
>
> "With respect to such 'obligations,' it provides that they shall be payable, dollar for dollar, in any legal tender. With respect to such 'provisions,' it provides that every one of them, past, present or future shall be void as against public policy. And it further provides that every obligation is payable, dollar for dollar, in legal tender, even though there be not included in the obligation such a provision to pay in gold. * * *
>
> "The Joint Resolution, not stopping with the phrase which outlaws the provisions in obligations calling for payment in gold, proceeds to make payment of legal tender sufficient for **all** obligations payable in money of the United States, whether they contain such a provision for gold payment or not. This latter provision, applicable to all such obligations, was not necessary if the Joint Resolution were only intended by the Congress to cover United States coin or currency, since the separate gold clause provision in the resolution took care of the question of United States coin and currency even if gold payments were promised. It must have been intended by the Congress to cover not only situations where gold had been promised, but also all cases where a promise has been made, like the present one, which would have required payment in some other manner than dollar for dollar on a parity

> with other obligations. An alternative currency provision is one of the contingencies at which the Joint Resolution was aimed."

The Appellate Division affirmed Justice Rosenman's decision, two justices dissenting. As stated supra, this case was reversed by the New York Court of Appeals.

4. **Anglo-Continentale Treuhand, A. G., et al. v. Bethlehem Steel Co.**, 254 App. Div. 844, 6 N. Y. Supp. (2d) 334, modifying decision below, 98 New York Law Journal 1164, October 15, 1937, reversed, New York Court of Appeals, January 11, 1939. This case was decided by the Appellate Division at the same time as it decided the **Zurich General Accident & Liability Insurance Co.** case, supra, and this decision was to the same effect, and it has been reversed by the New York Court of Appeals.

(c) **Decisions of Lower Federal Courts.**

1. **McAdoo v. Southern Pacific Company**, 10 F. Supp. 953, decided June 17, 1935, reversed 82 F. (2d) 121. There the district court reached the conclusion that a domestic holder of an interest coupon which provided for payment in United States gold coin, or, at the holder's option, in several foreign moneys, could recover the value of the foreign money. This decision was reversed by the Circuit Court of Appeals for the Ninth Circuit on jurisdictional grounds. The district court's conclusion was founded upon the premise that the Joint Resolution was directed solely against the conventional gold clause, saying, at page 954:

> "Congress was dealing with contracts calling for payment in gold coin of the United States; not with contracts payable in money of foreign countries."

2. **Anglo-Continentale Treuhand, A. G., v. St. Louis Southwestern Railway Company**, 81 F. (2d) 11 (C. C. A. 2), January 13, 1936, certiorari denied 298 U. S. 655. In this

that the court should not consider the circumstances surrounding the making of the contract to determine whether it was in fact a money contract, as, for instance, an agreement from an American debtor to an American creditor to repay American money loaned for use in America, or a commodity or foreign money contract, as, for instance, an agreement given to a foreign creditor to evidence a transaction in or concerning guilders. This premise the court emphasized in the next to the last paragraph of its opinion, as follows:

> "If the resolution did not reach bonds held by aliens when passed, it did not reach those then held by citizens; we cannot give the same words one meaning for one set of obligees and another for another. Congress either forbad the enforcement of such promises, or it did not. We will not try to recast it altogether, excepting alien obligees though its language covers them equally with citizens."

In that opinion it is said of the Joint Resolution, "It only proscribes a 'provision' which 'purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured' by either." But the Joint Resolution does more than this. It proscribes the provisions mentioned, but furthermore it directs that any obligation payable in money of the United States, whether or not the proscribed provisions are contained therein, is to be discharged upon payment, dollar for dollar, in United States legal tender.

This Court in **Holyoke Water Power Co. v. Paper Co.**, supra, swept away previous misconceptions, including the premises advanced by the Circuit Court of Appeals for the Second Circuit in support of its decision in **Anglo-Continentale Treuhand, A. G. v. St. Louis Southwestern Railway Company.**

It did not ignore the second sentence of the Joint Resolution, as did the Second Circuit, but to the contrary found that the obligation being considered by it was one to be discharged under the command of the second sentence, dollar for dollar, in legal tender. It said at page 335:

> "The obligation was one for the payment of money, and not for the delivery of gold as upon the sale of a commodity,"

and again, on page 339:

> "Accordingly, all such provisions* are declared to be against public policy, and every obligation, heretofore or hereafter incurred, though it contain such provisions, shall be payable, dollar for dollar, in legal tender at the time of payment";

and on page 340:

> " 'Dollar for dollar,' the obligation for the payment of money conforming to the standard of the covenant is to be discharged with money of the standard established by the law."

It is equally clear that the second premise of the Second Circuit Court of Appeals' decision that the application of the Joint Resolution may not vary with the circumstances surrounding the execution of a contract was expressly repudiated by this Court in the **Holyoke** case, where, in considering the contract there concerned, it observed, on page 335 of its opinion, that the lessor was a water power company engaged in that business and not in any other, and that there was no pretense that it was stipulating for gold to be used in art or industry, but that which it wished was currency or bullion susceptible of being converted into currency, and said:

> "We must consider the situation of the parties,

*Those mentioned in the first sentence of the Joint Resolution.

their business needs and expectations, in gauging their intention."

After this emphasis by this Court upon the duty to consider all surrounding circumstances in determining whether a contract is the kind of obligation which comes within the provisions of the Joint Resolution, it would be idle for anyone to refer to **Anglo-Continentale Treuhand, A. G. v. St. Louis Southwestern Railway Company** to support the proposition that varying circumstances may never determine whether an obligation is a money contract within the terms of the Joint Resolution or solely a commodity contract outside of its reach.

The Circuit Court of Appeals for the Eighth Circuit in its decision below perceived the irreconcilability of the views expressed by the Circuit Court of Appeals for the Second Circuit in the **Anglo-Continentale Treuhand** case with the guides given by the Supreme Court in the **Holyoke** case (R. 249).* It then proceeded to a determination of whether under the circumstances in the record before it the First Terminal and Unifying Bonds of the St. Louis Southwestern Railway Company were obligations payable in money of the United States, money contracts, dischargeable, dollar for dollar, in United States legal tender, or commodity contracts outside of the reach of the Joint Resolution. In determining this question it conducted an

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*It said: "Both the Anglo-Continentale Treuhand and the McAdoo opinions reveal the same reasoning in reaching a decision. That reasoning is that the language of the resolution is clear and unambiguous and means obligations which must be paid in United States gold dollars or the equivalent thereof in other United States money." That is indeed the effect of those decisions which find in the Joint Resolution only a proscription of any individual promise requiring payment of gold or a particular kind of coin or currency or an amount in money of the United States measured thereby. Thus, to come within the reach of the Joint Resolution, as so limited, there must be a promise which combines an agreement to pay in gold and an agreement to pay in United States money, which is, we take it, the peculiar feature of the conventional agreement to pay in United States gold coin. With the disappearance of United States gold coin from circulation it is not likely that the gold coin contract will again become popular. The Joint Resolution, if so interpreted, would have a very limited application in the future.

inquiry which had not been conducted by the Second Circuit Court of Appeals because that court had thought, upon grounds now untenable, that an inquiry of such a nature was pointless.

For the foregoing reasons, we contend that the decision of the Circuit Court of Appeals for the Second Circuit in the **Anglo-Continentale Treuhand** case was clearly wrong. Even if this were not true, however, there is no necessary inconsistency between the holding of the Second Circuit Court of Appeals, dealing with the rights of foreign holders of bonds to collect the interest in guilders, and the holdings of the courts below, dealing with the rights of domestic holders of such bonds. There are some expressions in the opinion of the Second Circuit Court of Appeals indicating that it would have reached a different conclusion than did the courts below in respect to the rights of domestic holders of such bonds. Since those expressions went beyond the point for decision they are dicta. As pointed out above, such expressions are not in accord with the criteria for the application of the Joint Resolution adopted by this Court in **Holyoke Water Power Co. v. Paper Co.**, supra. The Second Circuit Court of Appeals said in its opinion in the **Anglo-Continentale Treuhand** case, at page 13:

> "If the resolution did not reach bonds held by aliens when passed, it did not reach those then held by citizens; we cannot give the same words one meaning for one set of obligees and another for another. Congress either forbad the enforcement of such promises, or it did not. We will not try to recast it altogether, excepting alien obligees though its language covers them equally with citizens."

But Mr. Justice Cardozo, for this Court, 300 U. S. 324, 335, pointed out that the important consideration was whether the contract was a money contract within the reach of the

Joint Resolution or a commodity contract without the scope of such legislation, and to that end "We must consider the situation of the parties, their business needs and expectations, in gauging their intention," and he observed that in the case before the Court the contract did not represent the sale of gold and that the promisee was not desirous of receiving gold and did not have use therefor—"Weasel words will not avail to defeat the triumph of intention when once the words are read in the setting of the whole transaction."

It is submitted that where the bonds are issued in this country and are owned by United States citizens who paid dollars therefor, they represent a United States money contract—not a purchase of guilders—and are within the scope of the Joint Resolution of Congress dealing with United States money contracts. **The difficulty with the** DICTA **in the opinion of the Second Circuit Court of Appeals is that it ignores the circumstances of the parties and their intentions and expectations in respect to the payment of the bonds.**

3. **Emery-Bird-Thayer Dry Goods Co. v. Williams**, 15 F. Supp. 938. This case involves a lease calling for payment of rent in a stated number of grains of gold of a specific weight and quality, or, in the alternative at the lessor's option, in United States money of a specified amount. The lessee filed a petition for an injunction restraining the lessor from declaring a forfeiture of the lease because of the failure of the lessee to pay the rent in gold after June 5, 1933. The district court in Missouri decided the case in favor of the lessor. An appeal from the decision of the district court in this case is now pending in the Circuit Court of Appeals for the Eighth Circuit. An opinion of that court in 98 F. (2d) 166, rendered July 13, 1938, on the same day the decision below was handed down, was not regarded by the judges joining in the majority opinion

therein as conflicting with the decision below in this case. A petition for rehearing has been granted, the decree has been set aside, and the case was reargued on December 12, 1938. The Circuit Court of Appeals has not finished its consideration of that case, and any reliance on the language of that court in the decision on the first presentation of the case is premature. Even if the Eighth Circuit Court of Appeals should reaffirm the conclusions expressed in its first opinion in that case, in our judgment there is no necessary conflict between that case and the decision in the case at bar. Unquestionably in the **Emery-Bird-Thayer** case the option to receive United States money was secondary to a primary promise to deliver gold as a commodity, whereas in the instant case the promise to pay United States gold coin was either primary, as found by the courts below, or of equal rank with the other promises in the bonds, as contended for by petitioner.

(d) Periodicals.

Petitioner stresses particularly articles by Professor Nussbaum. The article bearing upon the question under consideration appears in 84 University of Pennsylvania Law Review 569. It is true that he states his disagreement with decisions applying the Joint Resolution to bonds payable in United States gold coin, or, optionally, in foreign moneys. However, he found it difficult to face the logical consequences of his position, and inconsistently suggests that the Joint Resolution should be held to apply to bonds of this character made in the future, although not applicable to such bonds issued before the adoption of the Joint Resolution—a distinction not possible under the language of the Joint Resolution and not consistent with the purposes prompting its adoption. Professor Nussbaum's comments in this regard, pages 582 and 583, are as follows:

"Although the doctrine advanced in the Bethlehem

Steel case does not stand analysis, there may be a repercussion of the Joint Resolution on the multiple currency matter. The Resolution not only abolishes gold obligations existing at the time of its enactment, but it forbids entering into such obligations in the future. Suppose Americans, under the rule of the Resolution, make a contract payable in a foreign currency generally considered at the time of contracting to be more stable than the dollar. Such conduct may be perfectly justifiable, for instance, where an American importer resells imported goods to an American wholesaler, thus trying to unload or distribute the risk as to the varying rates of exchange which he has taken in the ordinary course of his business. But where no such justification appears, suspicion and even an adverse presumption possibly will arise to the effect that nothing else is sought by the agreement than to secure, to the creditor, a guarantee virtually replacing a gold clause. Although the language of the Joint Resolution does not cover this case, application of the Federal Act might be possible under an evasion doctrine."

Prior to 1933 the owners of the bonds here involved had no ocassion to exercise the options for foreign money payment. Such options could not have enhanced the value of the bonds in their hands, since the financial community regarded the gold clauses contained in these bonds as adequate protection against depreciation of United States money. Under these circumstances, for an American holder to exercise the previously unused options for foreign money payment in order to create a basis for an action to recover more American dollars than his bond or coupon called for is as much an evasion of the Joint Resolution as would be the issuance at this time of new bonds containing foreign money options.

A note in 35 Columbia Law Review 1132 endorses respondents' position.

5. The First Terminal and Unifying Bonds Involved Here Are Primarily United States Money Obligations, Dischargeable as Directed by the Joint Resolution, and the Foreign Moneys Mentioned in the Foreign Money Options Were Intended as Equivalents of the United States Gold Coin Called for by the Bonds and Coupons.

Many of the decisions of the state and lower federal courts which have dealt with the point for decision have considered the application of the Joint Resolution to the coupons as disclosed upon the face of the obligations in suit. The Second Circuit Court of Appeals, in **Anglo-Continentale Treuhand, A. G., v. St. Louis Southwestern Railway Co.**, supra, assumed the promises to pay United States gold coin or the various foreign moneys, contained in the St. Louis Southwestern Railway Company coupons, to be co-ordinate obligations and equal alternatives (see the first sentence of the second paragraph of the opinion, 81 Fed. [2d] 11), and the court was careful to confine its decision to the language of the coupons before it, and said at page 12 of the opinion:

> "It is not necessary for us to decide that the joint resolution does not cover any conceivable promises to pay foreign currencies. Perhaps it may."

This Court in **Holyoke Water Power Co. v. Paper Co.**, supra **(decided after the Second Circuit decision)**, directs another approach. This Court there weighed the circumstances surrounding the making of the contract to see if the contract was a money contract (dischargeable, dollar for dollar, in currency under the Joint Resolution) or a commodity contract (outside the Joint Resolution); the Court, in the light of the circumstances, determined that it was essentially a money contract, despite the alternative for performance by delivery of bullion, and thus it was

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within the Joint Resolution. The Court noted at 300 U. S. 335:

> "The lessor was a water power company, engaged in that business and not in any other. There is no pretense that it was stipulating for gold to be used in art or industry. What it wished was currency, or bullion susceptible of being converted into currency, the lessee to make the choice. The alternative forms of payment shed light upon each other."

And it commented:

> "We must consider the situation of the parties, their business needs and expectations, in gauging their intention."

In addition, this Court prescribed a method of solving the problem when it said that the evil intended to be prevented by the Joint Resolution must be considered. In using the guide so prescribed, the Eighth Circuit Court of Appeals, in the opinion below, said:

> "In short, the evil struck at by the Resolution was contract provisions purporting 'to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby'—as defined in paragraph (b), 'payable in money of the United States.' The reason why this is an evil and the reason for preventing it being to prevent obstruction of the maintenance of the equal value of the various United States monies 'in the markets and in the payment of debts.'"

"With the evil and the reason for prevention in mind," the Circuit Court of Appeals proceeded to examine "the situation of the parties, their business needs and expectations, in gauging their intention," in order to determine whether the provisions of the instruments in question "fall within or without the evil."

In the instant case the record includes the mortgage pursuant to which the bonds were issued and the facts concerning the issue of the bonds have been stipulated. The bonds were originally sold to American purchasers and the rights to be determined on this claim are those of American bondholders represented by an American mortgage trustee. The Debtor is an American railroad company and its property and the security for the bonds are situated in the United States. In all the years between the issue of the bonds and the depreciation of the United States dollar in 1933, there was no demand for guilders (R. 134, 198), and the Debtor maintained no office for payment of guilders in Holland (R. 132, 159). The consideration received for the sale of the bonds was American dollars (R. 132, 160). The Debtor was borrowing money and not purchasing guilders or other foreign money (R. 134). The bond creditors were lending United States money and stipulating for its repayment and not selling guilders.

The Debtor's First Terminal and Unifying Bonds were issued to evidence the Debtor's liability for the repayment of sums of United States money borrowed; they were not issued upon a sale or purchase of guilders or other foreign money; the provisions contained in said bonds for optional payment in guilders or other foreign moneys were an assurance, in addition to the "gold clause" contained in the bonds, to the holders thereof against a depreciation in the value of the United States dollar; the amount of guilders mentioned in the bonds was at the time of the issuance of said bonds the equivalent of $1,000 United States gold coin of the standard of weight and fineness as it existed on January 1, 1912, and it was understood, and specified in the indenture under which said bonds were issued, that the amounts of guilders, pounds, francs or marks mentioned in said bonds were each the equivalent of United States gold coin in said amounts and of such standard of weight and fineness (R. 134).

Under these circumstances it is fair to assume that the bondholders expected repayment in United States money. The American holders of the bonds certainly regarded the obligations as payable in United States money and relied primarily upon the promise to pay in that money.

The mortgage shows that the bonds were primarily United States gold coin obligations and that the foreign moneys were intended as equivalents for United States gold coin. Article First, Section 4, of the mortgage (R. 39), which is quoted in full, supra, provides:

> "but **the face amount of each of such coupon bonds shall be $1,000 in United States gold coin** of the standard of weight and fineness existing on January 1, 1912, **or the equivalent thereof**, calculated at the rates of exchange stated in the form of coupon bond hereinbefore set forth."

A mortgage trustee obtains its rights from the mortgage and not from the bonds. In **In re Paramount Publix Corporation,** 72 F. (2d) 219, 222, the Circuit Court of Appeals for the Second Circuit said:

> "Its* claims are based upon the covenants in the indentures, and not on the bonds."

Here we have a claim of a mortgage trustee and we must look to the mortgage for a basis of the declaration of the trustee's claim.

Petitioner waves aside the above language in the mortgage. The 2,490 guilders called for by the foreign money option in the First Terminal and Unifying Bonds were the equivalent of $1,000 United States gold coin at the time of the issue of the bonds. In spite of this, petitioner says that the manner in which that amount of 2,490 guilders came to be fixed is completely immaterial here. We say

*The mortgage trustee's.

it is one of the most important facts in the case in that it clearly shows the intention of the parties. The parties did not contemplate a development whereby the foreign moneys called for by the foreign money option clause would become more than the equivalent of United States gold coin. This is made clear by Article Second of the mortgage dealing with the issue of First Terminal and Unifying Bonds. These provisions are summarized in the letter of the President of the Debtor to the purchasers of the bonds and in the bond prospectus prepared by the purchasing syndicate (R. 133, 160). By these provisions First Terminal and Unifying Bonds of a given face amount were to be issued against the retirement of an equal face amount of underlying bonds, or against the expenditure of a like amount in additions and betterments. Certainly the draftsmen of the instrument would have been shocked at the thought that they had provided for the issue of a First Terminal and Unifying Bond calling for the payment of guilders worth approximately $1,690 as against an expenditure of $1,000 in the retirement of underlying liens or in additions and betterments. The provisions of the mortgage, as well as the circumstances of the parties, emphasize the fact that the foreign moneys were regarded as the equivalents of United States gold coin. A further indication that the amounts in foreign moneys called for by the foreign money option clause were considered as the equivalents of the principal amounts of the bonds in United States gold coin is that the foreign money options were inserted in the coupon bonds but not in the registered bonds, and yet the bonds were interchangeable and the habendum clause of the mortgage provided that there should be no preference between the bonds thereby secured.

In the letter and prospectus describing the original issue of the First Terminal and Unifying Bonds, the

we have said, another promise which, as it turned out, threatens to increase the indebtedness of the Debtor by approximately 70 per cent. In the case of the First Terminal and Unifying Bonds the holder did not take the risk of the depreciation in the guilder because he was entitled to receive the consideration paid in dollars unless he elected otherwise, but he was, without any compensating risk on his part, accorded the privilege of securing the benefit of an appreciation in guilders. The appreciation of the guilder had no relation to any risk assumed or consideration paid by an American holder of the bonds.

The petitioner has argued in the courts below that the purchasers of the bonds from the Debtor paid United States gold coin therefor, and that consequently an alternative promise which does no more than to preserve to the bondholders the value of the gold coin paid cannot be condemned as constituting a fictitious increase in indebtedness. It may be that this is an effective answer to the contention of the respondents that the allowance of the claim made by the petitioner in this proceeding will result in a fictitious increase in indebtedness prohibited by the Missouri Constitution and statutes, but the answer of the petitioner leads inevitably to the conclusion that the bond contract is within the reach of the Joint Resolution. In contending that the optional promise to pay guilders is to be sustained under the Missouri Constitution and statutes because the guilders so promised are the fair equivalent of the United States gold coin received by the Debtor corporation and promised to be repaid by the bond contract, petitioner in effect concedes that the bonds are money contracts designed to secure the repayment of United States gold coin or its value. The very validity under state law of the optional promises to pay foreign moneys rests upon the assumption that they are a further assurance for the repayment of United States gold coin.

Guaranty Trust Company attempts to make the bond contract one for the payment of "neither gold nor money." Can there be any doubt that here a money debt was intended? Consideration of the mortgage, the bonds, the evidence, and the applicable Constitutional and statutory provisions in Missouri dispels any doubt as to this, and, to borrow the language of this Court in the **Holyoke** case, "The fact is of little moment that currency is characterized as a commodity, * * * as long as it is currency." There is no magic in the word "guilders." And in bankruptcy "guilders" means the dollar equivalent of guilders. Clearly this is a money debt. In the circumstances surrounding the issuance and sale of these bonds there is no indication of a sale or purchase of foreign money—of a commodity. It was a money transaction. As stated by the Circuit Court of Appeals in the opinion below: "These contracts are money and not commodity contracts."

If the foreign moneys are the equivalent of United States gold coin for the purposes of the mortgage; they should be regarded as such equivalent for the purpose of applying the Joint Resolution. It is submitted that it is a narrow and captious construction of the Joint Resolution which would give it effect as invalidating promises to pay United States gold coin and deny it effect in relation to provisions to pay United States gold coin, or, at the option of the promisee, the equivalent of United States gold coin.

Johnson v. Joyce, 90 Minn. 377, 97 N. W. 113, applying a statute forbidding usury, is analogous. The respondent in that case executed his note as follows:

> "On or before November 7th, 1897, for value received, I promise to pay to John B. Johnson, or order, \$497.00. If not paid when due this contract shall draw interest from maturity at the rate of 10% per annum. This agreement may be paid at the option of the makers thereof in No. 1 Northern Wheat, delivered to said John B. Johnson, at elevator at Osakis, Minn., on or

before maturity thereof at the rate of $1.50 per bushel, or if found in lower grades, at a proportionate price per bushel."

It was held that the agreement was usurious, the specified interest rate being unlawful, and that the alternative in reference to the delivery of wheat could not be enforced, since it was an alternative for the payment of usurious interest in money which latter provisions gave "tinge and color to the whole instrument."

As this Court has said in considering this very statute, **Holyoke Water Power Co. v. Paper Co.**, supra, page 340, "Things that are equal to the same thing are equal to each other." Once it is established, as it is in the record here, that the foreign moneys were intended as the equivalent of United States gold coin, the application of the Joint Resolution is inescapable. Whether or not **Anglo-Continentale Treuhand, A. G., v. St. Louis Southwestern Railway Company**. supra, was decided correctly, upon the facts before the court and upon the premises assumed in the opinion, it does not rule this case. Here the claim is on behalf of domestic holders for the principal of the bonds, upon a record showing conclusively that the primary obligation was to pay in United States gold coin and the foreign moneys were regarded as the equivalent of the gold coin.*

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*Although the rights of foreigners who purchased bonds prior to June 5, 1933, are not directly involved here, the Court may desire a discussion of our position as to such bondholders. We contend that the Joint Resolution makes no distinction between foreign and domestic holders. When a foreigner holds an obligation payable in money of the United States containing an option which would permit the holder to require payment in money of a foreign country and the holder must resort to the courts of this country to secure payment, such foreign holder stands in no better position than an American holder. The hardship worked upon the foreign holder by this hard and fast application of the Joint Resolution is in fact no greater than the hardship imposed upon the domestic holder.

As we see it, the only possible argument that could be made in favor of giving the foreign holder different treatment would apply only to those foreigners who acquired their bonds prior to the passage of the Joint Resolution, June 5, 1933. Such argument might run somewhat as follows:

From the standpoint of the domestic holder who lends money with the

We respectfully submit that this case can and should be decided on our principal contention, which has been upheld by the District Court and the Circuit Court of Appeals, that the Joint Resolution requires the claim to be allowed only in United States legal tender, and that the bonds are payable, dollar for dollar, in United States money. As concluded by the courts below, the Joint Resolution of

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primary hope and expectation of being repaid in money of the United States, the foreign money options merely afford protection against depreciation in the value of the American dollar. From the standpoint of a foreign holder who buys American bonds for the purpose of investment and with the expectation and purpose perhaps of receiving a return of foreign money upon payment of the bonds, the foreign money options are for the purpose of enabling such holder to get back the foreign money. In other words, the foreign money options from the standpoint of such foreign holder are not for the purpose of protecting such holder against depreciation of the money of the United States, but to enable him to get back foreign money. If, therefore, such foreign holder should prove that he had acquired the American bonds prior to June 5, 1933, as an investment with the expectation of being repaid in the money of his country, it might be held that such foreign holder stands in a different position from the American holder who relies upon the foreign money alternatives as a means of protection against depreciation of the American dollar. The legal result may be dependent upon the circumstances. From the standpoint of the domestic holder, enforcement of the foreign money options would enable such holder to evade the public policy of the United States. From the standpoint of the foreign holder, it would permit him to secure repayment in the money contemplated at the time of the investment.

From the standpoint of the foreign holder the enforcement of the foreign money options merely enables him to get the amount of foreign money which the bond contemplates that he would receive. From the standpoint of the domestic holder, the enforcement of the foreign money options would enable him to get a substantially larger number of United States dollars than the face amount of the bond.

In the case at bar we are dealing exclusively with American holders. The very argument which might be made by foreign holders, indicated above, is in itself an argument in support of our contention (supported by the courts below) that the Joint Resolution is applicable to domestic bondholders.

On this point the Circuit Court of Appeals said in the opinion below (R. 254):

> "In what has been stated above, we have had in mind the situation before us. Whether a contract arising out of transactions between citizens and foreigners—such, for example, as purchase of foreign goods by citizens—wherein payment was provided at foreign cities in foreign currencies, even if such currencies were measured by defined gold dollars, is without our present consideration. Also, we have not considered contracts involving satisfaction in gold as a commodity. While foreign currencies are, if within this country 'commodities' in the sense that they have no standing as mediums of exchange, yet the contract provisions here provide for 'payment' in money only and in foreign monies only within foreign countries. These contracts are money and not commodity contracts."

amount of the Debtor's funded indebtedness, including the First Terminal and Unifying Bonds, per mile of railroad, and the amount of annual interest charges upon the First Terminal and Unifying Bonds and other bonds, were described in terms of United States dollars only (R. 160-162).

If there were any doubt as to the meaning of the mortgage provisions, it is dispelled by applicable constitutional and statutory provisions in the State of Missouri. As previously pointed out, the Debtor is a Missouri corporation. Article XII, Section 8, of the Constitution of the State of Missouri, and Section 4546 of the Revised Statutes of Missouri, 1929, make void any fictitious increase of indebtedness of Missouri corporations.* In view of the fact that these bonds were issued in consideration of an amount of United States money less than the principal amount of the bonds, the establishment of a claim for guilders would in effect be an increase of the indebtedness of the Debtor over and above the principal amount of the bonds, and this, we have argued, would be a ficti-

*Article XII, Section 8, of the Constitution of Missouri provides:

"Sec. 8. Stock and bonded debt, how issued or increased.—No corporation shall issue stock or bonds, except for money paid, labor done or property actually received, and all fictitious increase of stock or indebtedness shall be void. The stock and bonded indebtedness of corporations shall not be increased, except in pursuance of general law, nor without the consent of the persons holding the larger amount in value of the stock first obtained at a meeting called for the purpose, first giving sixty days' public notice, as may be provided by law." (Adopted 1875.)

Section 4546 of the Revised Statutes of Missouri 1929 provides:

"Sec. 4546. Stock and bonds, for what issued—capital stock, how increased—fictitious issues void.—The stock or bonds of a corporation shall be issued only for money paid, labor done or money or property actually received. Any corporation may increase its capital stock or its bonded indebtedness with the consent of the persons holding the larger amount in value of the stock, which consent to such increase shall be obtained at a meeting of the shareholders, called for that purpose, and of which meeting sixty days' public notice of the time, place and general purpose of such meeting shall be given by advertisement in a daily or weekly newspaper published in the town or city where the principal offices of the company issuing such stocks or bonds may be located. All fictitious issues or increases of stock or of bonds of any corporation shall be void." (R.S. 1919, Sec. 9740. Amended 1923, p. 315; 1925, p. 168.)

tions increase of the indebtedness of the Debtor for which it did not receive an equivalent in money paid, labor done, or property actually received, as required by the state Constitution and statutes. Such an increase is prohibited by the constitutional and statutory provisions of the State of Missouri, and is contrary to its public policy. These constitutional and statutory provisions were in effect from 1912 to date.

It is firmly established in Missouri that a corporation may not issue its stock for less than par. **Berry v. Rood,** 168 Mo. 316, 328, 67 S. W. 644; **Van Cleve v. Berkey,** 143 Mo. 109, 44 S. W. 743; **Garrett v. Kansas City Coal Mining Co.,** 113 Mo. 330, 20 S. W. 965. The sections of the Constitution and statutes referred to are as applicable to bonds as to stock, and have been so applied. **Kemmerer v. St. Louis Blast Furnace Co.,** 212 F. 63 (C. C. A. 8, 1914); **Mudge v. Black, Sheridan & Wilson et al.,** 224 F. 919 (C. C. A. 8, 1915).

We may concede that a Missouri corporation in 1912 could lawfully issue its bond for $1,000 upon receipt of 2,490 guilders, the then equivalent of $1,000. Likewise, the concession is in order that a Missouri corporation in 1912 could have issued its bond whereby it agreed to pay 2,490 guilders in consideration of the receipt of $1,000. In such cases the promise contained in the bond is in respect to a different medium than the consideration received, and corporation and bondholder, respectively, take the chance of a variation in the future values of dollar and guilder. The instant case is different. The Debtor, in consideration of receiving $1,000 or less in United States money, agreed to pay the $1,000, with interest, and also agreed to another and alternative performance in the payment of guilders. The United States money consideration received was exhausted by the promise to repay that much and more, with interest, in United States money, and it could not support,

Petitioner's Argument II A 1 (pages 48 to 52, its brief).

Petitioner states that the Joint Resolution is confined to the nullification of the "traditional gold clause."

We have elsewhere in our brief developed the considerations for believing that the Joint Resolution applies to every bond payable in money of the United States, irrespective of options for payment in foreign moneys. We shall not repeat these considerations but shall limit ourselves to demonstrating that the assertion that the Joint Resolution dealt only with the traditional gold clause is unsound. We assume that by the "traditional gold clause" petitioner refers to the conventional agreement to pay in gold coin of the existing standard of weight and fineness, or of similar purport.[1] Congress could have dealt with the traditional gold clause by directing that all agreements to pay in United States gold coin should be discharged in United States legal tender without more. The Joint Resolution does much more. Section 1 (a) renders void a provision purporting to give the obligee a right to require payment in gold (a gold bullion contract); it renders void an agreement to pay in any kind of United States coin, which would include silver coin as well as gold coin; it renders void an agreement to pay in a particular kind of United States currency, which includes [see Section 1 (b) of the Joint Resolution] Federal Reserve notes and circulating notes of Federal Reserve Banks and national banking associations; it renders void an agreement to pay United States money measured by gold (a gold value contract) or by United States coin or currency, and, finally, it provides that **every** obligation payable in money of the United States shall be discharged in legal tender. Throughout the Joint Resolution such words of inclusive import as "every" and "any" are

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1 For enumeration of conventional gold clauses, see 20 Am. Bar. Assn. Journal 370 (June, 1934).

used, and only a mind approaching the case from a predetermined bias could assert that the Joint Resolution is limited to a gold coin contract.

Petitioner's Argument II A 2 (pages 52 to 62, its brief).

The petitioner has invited an examination of the accompanying legislation, committee reports, and Congressional debates to determine the intended scope of the Joint Resolution.

In these sources we find no direct reference to multiple currency bonds. We do perceive an unmistakable intent by Congress to relieve debtors from the duty to pay in a value measured by the previous gold coin and to direct that all money contracts, however worded, should be discharged, dollar for dollar, in United States legal tender, and, especially, Congress was intent upon there being no discrimination between debtors in the application of this legislation.

Congress had in mind on June 5, 1933, the devaluation of the United States gold dollar, as has been pointed out by this Court.

Congress was aware that a reduction in the gold content of the dollar would not only increase the dollar value of gold, but would also increase the dollar value of foreign moneys. On this point petitioner and respondents are in accord (see pages 54 to 57, petitioner's brief).

Congress felt that it could not exercise its constitutional power to reduce the gold content of the dollar without invalidating, as obstructions to that power, all contracts which operated to cast the burden upon debtors of compensating creditors for such devaluation. The Attorney General in his argument in **Norman v. B. & O. Railroad Co.**, 294 U. S. 240, said:

> "I do not understand that any responsible person seriously disputes the right upon the part of the gov-

the second sentence thereof, where it directs affirmatively that **every** obligation, **heretofore or hereafter incurred**, payable in money of the United States, shall be discharged upon payment, dollar for dollar, in legal tender.

Petitioner's Argument I D (pages 39 to 46, its brief).

The petitioner's thesis is that the bond contract gave rise to no obligation until there was an election by the promisee as to the medium of payment, and that, since the purported election was to receive guilders, the only obligation that ever existed was for the payment of guilders.

If the respondents and the courts below are correct in regarding the bonds as payable in dollars unless an election for other performance is made, the petitioner's argument fails. If the promise to pay dollars is primary, the duty was to pay dollars unless or until that duty was dislodged by affirmative election by the promisee for other performance.

Petitioner's thesis is also untrue if the promises are regarded as equal alternatives. Petitioner loses sight of the distinction between obligation and liability, which was well stated in the passage quoted from Professor Williston's work on Contracts, supra, page 24. Professor Williston points out that in the case of a contract containing alternative promises, the **obligation** arises at the time the contract is made, although the particular **liability** is not determined until after election. Thus the First Terminal and Unifying Bonds were obligations which were capable of being paid in money of the United States at the time of the adoption of the Joint Resolution on June 5, 1933, although election as to the medium of payment had not been made at that time.

The fact that the character of a contract may be determined by an alternative promise contained therein prior to the exercise of an election of that alternative is illus-

trated by the cases cited in footnote 16 on page 43 of petitioner's brief. These cases hold that where a note contains a promise to pay money or deliver a commodity, it is payable in money so as to be negotiable. If these cases held that such a note is negotiable only after the money alternative had been elected, they would tend to sustain the petitioner's position. Since they hold that such a note is negotiable and payable in money prior to election, they sustain the respondents' position that the First Terminal and Unifying Bonds were payable in United States money prior to the purported election. See **Hotchkiss v. National Bank**, 21 Wall. 354, 358, in addition to the cases cited by petitioner.

Petitioner attempts to make an analogy between the case at bar and the cases cited on page 44 of its brief dealing with fire insurance contracts. These cases are distinguishable. First, they determine that the performance due under the contracts after election is to be determined in accordance with the election made, but they do not hold that these insurance contracts are to be regarded as building contracts *ab initio*. Second, the contracts there involved are not money contracts. In the case at bar the contract is purely a money contract, payable in United States gold coin or the equivalent thereof in foreign moneys.

If petitioner's reasoning is accepted, an alternative contract to pay $1,000 in United States gold coin or 25,800 grains of gold nine-tenths fine is not an obligation payable in money of the United States if the gold bullion option is exercised, and is missed by the Joint Resolution entirely. We did not suppose that such an argument could be made after **Holyoke Water Power Co. v. Paper Co.**, supra.

tract must be treated as one for the payment of gold coin or its equivalent.

Petitioner's Argument I C (pages 32 to 39, its brief).

The petitioner argues that if one of the alternatives in an alternative contract becomes impossible of performance or is illegal, the other alternatives stand and their performance will be enforced. It is unnecessary for us to discuss this point in detail because we rest our case upon the premise that the Debtor's First Terminal and Unifying Bonds are as a whole obligations payable in money of the United States and are thus to be discharged under the second sentence of the Joint Resolution, dollar for dollar, in United States legal tender. However, it is desirable to note the true extent of the rule stated in 6 **Williston, Contracts** (Rev. Ed. 1938), Section 1779, quoted by petitioner on page 33 of its brief. The concluding sentence of this quotation is:

> "If the whole transaction was for an illegal purpose, or probably if the illegal covenants showed gross moral turpitude, the other covenants, though in themselves perfectly legal, would not be enforced."

Authorities exemplifying the application of this principle are **Burlington C. R. & N. Ry. Co. v. Northwestern Fuel Co.**, 31 F. 652; **Baltimore & O. R. R. Co. v. Miller**, 183 Ind. 323, 107 N. E. 545. We believe it to be established in the record in this case that the parties to the bond contract had no use for foreign moneys as such, but that the whole contract was designed to secure for the creditors a return of United States gold coin of the 1912 standard or its equivalent in value. Thus the result sought to be accomplished by the contract as a whole and by each alternative therein was one which came to be condemned upon the adoption by Congress of the Joint Resolution of June 5

1933. The whole transaction was for a purpose which, though legal when it was made, has by the passage of the Joint Resolution now become illegal and cannot, therefore, be enforced.

On page 35 of its brief petitioner makes the following concession:

> "If these bonds had been issued after the passage of the Joint Resolution of June 5, 1933, then the question whether the foreign money alternatives were inserted in the instruments for the purpose of evading the Joint Resolution, by attempting to provide for 'a fourfold further assurance in these foreign currencies of values based on the specified gold dollar' (R. 253), might become relevant."

This amounts to a concession of the correctness of our contention that the purpose of inserting the alternatives is relevant, for the reason that the Joint Resolution strikes at past transactions as well as future transactions. It is true that there was no element of evasion of any existing statutory policy when the parties executed these bond obligations in 1912, any more than there was a violation of any existing statutory policy in the insertion at that time of the conventional gold clause. However, these contracts are to be performed after the passage of the Joint Resolution, and the Joint Resolution condemns any contract theretofore or thereafter made which tends and was designed to accomplish, after June 5, 1933, the result condemned. The fact and not the motive of illegality is controlling.

Petitioner concludes this portion of its argument (Brief, page 39) by stating that **unless the Joint Resolution** contains some affirmative provision to the contrary, the only effect of the nullification of the gold clause was to strike that clause from the instruments. The Joint Resolution **does** contain an affirmative provision to the contrary in

Petitioner misapprehends the point of the opinion of the Circuit Court of Appeals. That court pointed out that each of the foreign moneys mentioned in the foreign money options was intended as the equivalent of $1,000 United States gold coin of 1912 weight and fineness, that each was equivalent at that time, and that payment of the foreign moneys in the future was promised as a further assurance to the creditors of securing the value of the United States gold coin of the 1912 standard of weight and fineness. I is also true that the guilder options, if enforceable, and i the petitioner's contention as to damages is accepted would work out in this case to give the bondholders claim for the equivalent in United States currency of th 1912 gold coin. It was not thought by the Circuit Cour of Appeals, as petitioner seems to think (Brief, page 25) that the guilder options gave an absolute assurance of re turning to the bondholders the value of the United State gold coin. This the Circuit Court of Appeals recognize when it said (R. 253):

> "Since the face amount of the obligations is ca culated in terms of the gold dollar at a specific dat the real effect is to give an option of payment in th most advantageous money (foreign or domestic which, at the time of payment, nearest approaches th specified gold dollar value."

The option to pay 2,490 guilders, for instance, assured to th creditors the receipt of the value of $1,000 of United Stat gold coin so long as Holland remained on its existing gol standard. The opinion of the Circuit Court of Appea was based upon the fact that the foreign money optio were intended to and did in some measure accomplish th purpose forbidden by the Joint Resolution. The contra is not to be saved from the application of the Joint Res lution because its purpose of securing to the lender th return of United States gold coin or its value may be d

feated by fortuities such as war, depression, and other events beyond the control of the parties, causing foreign countries to devalue their moneys. Indeed, the conventional gold clause, even in a case where it has not been rendered invalid by the Joint Resolution, has been held by this Court not to accomplish the result of securing to the holder of the obligations a payment in United States gold coin of a specified standard of weight and fineness. **Perry v. United States,** 294 U. S. 330. If the petitioner is correct, the foreign money option will secure to the creditor the value of United States gold coin, although a gold clause, where valid, would not have done so. The fact that the intent of the parties may be frustrated to some extent does not prevent the application of the Joint Resolution.

We believe the petitioner to be in error in its assumption on page 24 of its brief that the Circuit Court of Appeals' decision would have been different if the primary promise had been to pay in "United States money" rather than in United States "gold coin." Any obligation payable in money of the United States is within the terms of the Joint Resolution, and the first sentence in the Joint Resolution condemns equally an agreement to pay in gold or in a particular kind of currency of the United States.

The argument that the guilder alternative is not the equivalent of the gold clause is fully answered by the language in the indenture reading as follows (R. 39):

> "the face amount of each of such coupon bonds shall be $1,000 in United States gold coin of the standard of weight and fineness existing on January 1, 1912, **or the equivalent thereof,** calculated at the rates of exchange stated in the form of coupon bond hereinbefore set forth."

Therefore, the guilder alternative falls directly within the terms of the Joint Resolution for the reason that the con-

ever, is resolved by the indenture provisions. The provisions of a trust indenture not in conflict with the provisions of the bonds will control the rights of the parties. **McClelland v. Norfolk Southern R. R. Co.**, 110 N. Y. 469, 474, 18 N. E. 237; **Reitz v. Pontiac Realty Co.**, 316 Mo. 1257, 293 S. W. 382. Article First, Section 4, of the Indenture (R. 38, 39) provides:

> "All or any of the coupon bonds * * * shall be payable at the office of the Railway Company in the Borough of Manhattan in the City and State of New York, or, at the option of the holders of said coupon bonds, in the cities and countries, respectively, and in the respective currencies stated in the form of coupon bond hereinbefore set forth, * * *."

Language could not be clearer to show that the bonds are payable in New York, in United States money, in the absence of an election by the holders of the bonds.

Even if the promises are equal alternatives, it is not true that the promise to pay guilders is unrelated to the promise to pay United States gold coin. To the contrary, the indenture provides (R. 39):

> "the face amount of each of such coupon bonds shall be $1,000 in United States gold coin of the standard of weight and fineness existing on January 1, 1912, or the equivalent thereof, calculated at the rates of exchange stated in the form of coupon bond hereinbefore set forth."

Thus by definition of the parties themselves, the foreign moneys are the equivalent of $1,000 United States gold coin. The petitioner itself recognizes that the guilders were not desired for themselves, but rather were intended as a measure of value. It says on page 21 of its brief "There is no indication in the terms of the bonds and coupons, and there was no suggestion to purchasers a

the time of sale, that the holder could receive payment only in the currency of his domicile."

If the petitioner's case rests, as it seems to believe, upon the proposition that the promise to pay guilders was independent of the promise to pay United States dollars, it must fail for the following reasons among others: (1) the promise to pay guilders was associated as an option or alternative with the promise to pay United States gold coin; (2) if the bonds are read together with the mortgage, it appears that the bonds are primarily payable in United States money and are so payable unless option for other payment is exercised; (3) the amounts of the foreign moneys are fixed in accordance with the terms of the indenture as the equivalent of the United States gold coin face of the bonds.

We cannot agree with petitioner's argument on pages 21 and 22 of its brief, where it seems to believe that the nature of the contract must be determined without resort to anything outside the face of the bonds. Certainly all the instruments, including the indenture, must be construed together. Moreover, the inquiry is to determine the nature of the contract for the purpose of applying the rule of public policy enunciated by Congress, and in that determination the Court is not bound by a parol evidence rule but must consider all pertinent facts. When thus considered, the question is conclusively determined by a necessary consideration of the unambiguous language used in Article First, Section 4, of the mortgage, and petitioner's statement that such language is at best a mere inference of a primary obligation to pay in United States dollars becomes meaningless.

Petitioner's Argument I B (pages 24 to 32, its brief).

The guilder alternative was intended as an equivalent of and a supplement to the promise to pay in United States gold coin.

Congress of June 5, 1933, reaches and applies to every obligation payable in money of the United States, incurred before or after June 5, 1933, whether or not there is contained therein or made with respect thereto any provision which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States or in an amount in money of the United States measured thereby, and every obligation payable in money of the United States must be discharged upon payment, dollar for dollar, in any coin or currency of the United States which at the time of payment is legal tender for public and private debts. (See conclusions of District Court, R. 140, 141.)

(C) As Applied to the Facts of This Case, the Arguments in Petitioner's Brief Are Not Persuasive.

The respondents have stated affirmatively the reasons why the Joint Resolution directs the method of discharge of the Debtor's First Terminal and Unifying Bonds. We shall now consider the arguments of the petitioner in the negative and give our answers to these arguments.

Questions Presented as Conceived by Petitioner (pages 2 to 4, its brief).

The respondents are of the opinion that questions are presented in this case in addition to those stated by petitioner, and, moreover, believe that the question as to the application of the Joint Resolution to the bonds should be stated so as to include all relevant facts, see pages 8 to 11, supra.

Petitioner's Statement of the Case (pages 6 to 11, its brief).

We have given our statement of the case, supra, pages 2 to 8. Petitioner's statement contains some disputable conclusions and some omissions.

The petitioner omits the provisions of the mortgage touching upon the foreign options quoted on page 3, supra.

The facts stated on page 8 are substantially correct, but we are unable to see that the fact that arrangements were made by the Debtor for payment in foreign moneys abroad leads to the conclusion that the Debtor had no thought of the foreign money options as further assurances of the repayment of United States gold coin or its value. Prior to the depreciation in the value of United States money in 1933, the holdings of the bonds in the countries whose monetary units were mentioned in the bonds, or in Europe generally, were negligible (R. 198). No request was made for payment in guilders by any one prior to 1933 (R. 134). We differ, of course, with the petitioner as to its power to make an election vested by the bonds in the bondholders.

Decision of the District Court (pages 11 to 14, petitioner's brief).

The Findings of Fact made by the District Court were based upon a record consisting of stipulated evidentiary facts supplemented by some oral and uncontradicted testimony. The Findings include findings of ultimate facts, for example, as to the purpose of the parties in inserting the foreign money options, based upon the evidentiary matter before the court. They are not conclusions of law and will be accepted by this Court unless the petitioner can show that they are unsupported by competent testimony. **United States v. Commercial Credit Co.**, 286 U. S. 63, 67. The petitioner does not accept as the basis of its discussion the facts found by the District Court below, but disregards them as immaterial, unsupported by evidence, or not findings at all. Petitioner does not point out in what respects the Findings should be ignored.

on these grounds, and in its argument often assumes the facts to be the exact contrary of the facts which were found by the District Court below. The Findings of the District Court are in every instance supported by competent, and in our opinion conclusive, evidence.

The conclusions of law of the District Court speak for themselves and do not need any defense from us.

Petitioner's Analysis of the Circuit Court of Appeals' Decision (pages 14 to 16, its brief).

We believe it true that the Circuit Court of Appeals construed the First Terminal and Unifying Bonds as imposing upon the Debtor a duty to pay gold dollars unless and until the optional payment in one of the other specified currencies was exercised. In other words, the promise to pay United States money was the primary one. This was in accord with the conclusion of the District Court (Conclusion of Law No. 3, R. 141). While the face of the bonds may leave uncertain which promise was primary, the mortgage supplies this deficiency and makes clear that the primary promise was to pay in money of the United States, i. e., that the bonds should be paid in that medium unless and until an election was made for other payment, infra, pages 75, 76. But neither the District Court (R. 141) nor the Circuit Court of Appeals based its decision upon this narrow point. The Circuit Court of Appeals' found that the Joint Resolution directed the discharge in United States legal tender of all obligations which may (i. e., alternatively) be paid in money of the United States where the amount or value of the alternatives is based upon the gold dollar (R. 254). In other words, the Court held that where there exists an obligation capable of being paid in United States money, and where the alternatives to United States money payment were measured by United States money, such contracts were not only within the

language of the Joint Resolution, but were also within the very evil or mischief at which the Joint Resolution was aimed. Thus the opinion does not rest exclusively upon the finding that the dollar payment is the primary alternative, but the decision would undoubtedly have been the same had the Court found the alternatives to be equal.

Petitioner's Argument, Point I (pages 17 to 19, its brief).

Petitioner's assertion that the claim in controversy is based exclusively upon an absolute and independent contract to pay guilders in Holland simply is not true. The petitioner's claim is based upon the exercise of an option or alternative to be paid in guilders contained in a bond also payable in money of the United States, the foreign money options being inserted as the intended equivalent of the United States money loaned and to be repaid. The promise to pay guilders is interrelated with and dependent upon the duty to pay United States gold coin. Whether such a bond contract is as a whole within the reach of the Joint Resolution is the very question before the Court, and an argument based upon the premise that the promise to pay guilders stands entirely alone is arguing in a circle.

Petitioner's Argument I-A (pages 19 to 24, its brief).

Although we do not think that the case turns upon the point, we cannot agree with the petitioner that no one of the promised currencies of payment is primary and none is subordinate. To the contrary, we believe the case to be, as the District Court found (R. 141), that the bonds are payable in United States money unless election is made for payment in foreign moneys. It may be that the face of the bonds leaves undetermined the question as to the medium of payment if no election is made. Doubt, how-

because they are comparatively small in number. Suc bonds represented a portion of the aggregate of bonds o structing the power of Congress to devalue the dolla and Congress had constitutional power to deal with eve portion of the bonds presenting such obstruction. As matter of fact, the amounts involved in connection wi bonds containing foreign money options are much great than the amounts involved in connection with leases of t character passed upon by this Court in the **Holyoke** cas

Neither is there a constitutional inhibition against Co gress announcing a rule of public policy to be enforced the courts of this country in respect to contracts wherev they are to be performed. **Union Trust Co. v. Grosma** 245 U. S. 412. Does petitioner contend that it would unconstitutional for Congress to deal with a contract b tween American citizens for the payment of United Stat gold coin of an existing standard of weight and finene in London?

Arbitrary discrimination does not occur if the statu is given a general application so as to reach all Unit States money contracts containing provisions for compe sating the creditors at the expense of the debtors in t event of monetary depreciation. To the contrary, ar trary discrimination does occur if that result can be a complished by one device and not by another.

We are not dealing in this case with a contract contai ing a primary commodity alternative to which the mon alternative is subordinate, nor with a case where the co modity is sought for itself and not as a measure of mone We are concerned here with a contract for the repayme of United States money borrowed and with alternati promises designed to secure to the creditor United Stat gold coin or its equivalent in value.

We do not undertake to answer the arguments presented in the brief of Harry Hoffman, amicus curiae, as they are largely repetitions of the arguments made by the petitioner. Mr. Hoffman on page 48 of his brief refers to the case of **New Brunswick Railway Company v. British and French Trust Corporation, Limited,** decided by the House of Lords in England on December 13, 1938. This case in no way sustains any contention made by the petitioner or the amicus. In that case the defendant attempted to apply legislation adopted in Canada on April 10, 1937, somewhat similar to the Joint Resolution of Congress, to the bonds of a Canadian company payable in pounds sterling in England, of a specified standard of weight and fineness, where the action was brought in the English courts and where judgment had been applied for therein prior to 1937. The House of Lords decided the case for the plaintiff on the ground that the Canadian statute should be limited in its application to suits brought in Canada and also on the ground that it should not apply to a case where judgment had been requested prior to the enactment of the legislation. On the first point the Lord Chancellor said:

> "in my opinion Section 4 must be confined upon its true construction to cases where the action to recover the amount due is brought in Canada, which would be a not uncommon case, and is not intended to have any application elsewhere."

This language supports our contention in the instant case that the Joint Resolution should apply where the action or proceeding is between American citizens in the courts of this country.

No provision of the mortgage gives a right of election to petitioner. The portions of the mortgage upon which petitioner attempts to rely contemplate a judgment and sale upon default (Mortgage, R. 7). Here we have a bankruptcy proceeding where such steps are forbidden (R. 183). Nowhere in the mortgage is there any language giving the mortgage trustee the rights which it claims it has or can exercise in a bankruptcy case. There can be no foreclosure or entry here. There can be no sale. Petitioner can merely file a claim. A reading of the language of the indenture upon which petitioner relies will convince one that it cannot be stretched to give it the meaning which petitioner by wishful thinking has read into it. Even if petitioner could file an equity suit, it would be the duty of the mortgage trustee to determine the desires of the bondholders before it could ask for damages in one of the foreign currencies.

There is no implication of power in the trustee to make the election. The language of the mortgage is clear and unambiguous. Furthermore, implied powers of the kind mentioned in the authorities cited by petitioner below do not include a right in the mortgage trustee to transfer to itself powers which by the terms of the mortgage are clearly reserved to the bondholders.

Petitioner contended below that title to the debt passed completely to Guaranty Trust Company of New York, as trustee. In this language the mortgage trustee attempted to justify its usurpation of power (power given only to the bondholders). That this position is untenable hardly needs stating. If this were true, bondholders could not even file claims and much less make an election as to mode of payment.

Referring to this very section of the statute, the Circuit Court of Appeals for the Eighth Circuit said in **Blumgart**

v. St. Louis-San Francisco Ry. Co., 94 F. (2d) 712, certiorari denied 304 U. S. 567:

> "The obvious intendment is that such creditors* can file such claims, and, if the trustee does not do so, must file such in order to secure recognition and classification in the reorganization proceedings. This statute having thus declared the rights of the bondholders, no provision in the deed of trust can prevent them exercising such rights. * * *
>
> "In view of the statute, this mortgage is ineffectual as a bar to the right of individual bondholders to file their claims on their bonds and is ineffectual as a limitation upon such right to the extent that it is prejudicial to such right. Thus, this subsection provides a required way in which the bondholders must act to have their rights protected—either by the trustee filing a claim for all of the bondholders or the bondholders filing for themselves."

The First Terminal and Unifying bondholders can file proofs of claim and many have done so; many also have elected to receive dollars instead of guilders. If any doubt on this point ever existed, it was resolved against the contentions of petitioner by the Eighth Circuit Court of Appeals in the **Blumgart** case, supra, where that Court, speaking through Judge Stone, said:

> "The bondholders are the creditors under a mortgage." (Citing cases.)

Flying in the face of this decision, petitioner asserted that **it** is the creditor. See, also, **In re Allied Owners Corporation**, 74 F. (2d) 201, which announced principles which were approved by the Circuit Court of Appeals for the Eighth Circuit in **Bitker v. Hotel Duluth Co.**, 83 F. (2d) 721 (1936).

Even if we were to assume that in some manner this

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*Bondholders.

II.

ASSUMING THAT THE GUILDER OPTION IS VALID, GUARANTY TRUST COMPANY OF NEW YORK, AS MORTGAGE TRUSTEE, HAD AND HAS NO RIGHT UNDER THE TERMS OF THE BONDS, COUPONS OR THE MORTGAGE, OR UNDER AMENDATORY SECTION 77, TO MAKE AN ELECTION ON BEHALF OF HOLDERS OF ANY OF THE BONDS OR COUPONS FOR GUILDERS OR ANY OTHER OF THE SEVERAL FOREIGN MONEYS MENTIONED IN THE MORTGAGE, THE ELECTION BEING SPECIFICALLY RESERVED BY THE TERMS OF THE BONDS, COUPONS AND THE MORTGAGE TO THE HOLDERS OF THE BONDS AND COUPONS.*

Let us assume for the moment that this Court is unable to uphold the ruling of the courts below on the ground that the Joint Resolution applies to these bonds and coupons. We contend that regardless of the decision on this point the result reached by the courts below may and should be sustained on other grounds. We contend that the guilder election, if its exercise after June 5, 1933, is valid, is specifically reserved by the terms of the bonds, coupons and the mortgage, to the holders of the bonds and coupons.

The coupon bonds, which bear the optional payment clause, state that payment will be made **"at the holder's option"** at the designated offices in the cities mentioned and the mortgage itself contains a similar provision. Any contention that the mortgage trustee, as representative of the bondholders, has the right to make the election as to mode of payment is conclusivly answered by these four words: **"at the holder's option."**

The provision in Article First, Section 4, of the Mort-

*As explained supra, page 10, petitioner did not brief this point, but respondents deem it essential to present all points involved.

gage (R. 38), in respect to payment of the bonds, is as follows:

> "All or any of the coupon bonds issued hereunder from time to time shall be payable at the office or agency of the Railway Company in the Borough of Manhattan in the City and State of New York, or, **at the option of the holders of said coupon bonds,** in the cities and countries, respectively, and in the respective currencies stated in the form of coupon bond hereinbefore set forth, but the face amount of each of such coupon bonds shall be $1,000 in United States gold coin of the standard of weight and fineness existing on January 1, 1912, or the equivalent thereof, calculated at the rates of exchange stated in the form of coupon bond hereinbefore set forth."

The First Terminal and Unifying coupon bonds provide (R. 19):

> "Payment of the principal and interest of this bond will be made, **at the holder's option,** at the office or agency of the Railway Company * * * in the City and State of New York, or at designated offices in the foreign cities and countries above mentioned."

It does not admit of doubt that there must be an election by the **holders** of the bonds to make the bonds payable in guilders. In the absence of such election the bonds are payable in dollars (R. 38).

Petitioner relied below on a notice to bondholders stating that the mortgage trustee intended to elect guilders (R. 177). But the mortgage gives the mortgage trustee no such right. The mortgage says that the guilder election may be made "at the holder's option"; it does not say that the trustee may give notice of an intention to exercise the option for the holders of the bonds. Petitioner, however, claims that the power of election is one of its essential rights (Brief, page 41).

plain the meaning of the word "payable." The statement by Representative Steagall, quoted on page 77 o petitioner's brief (77 Cong. Rec. at 4583 miscited by petitioner as 4528), to the effect that the Resolution declare that contracts requiring the discharge of obligations solel by payments in gold are contrary to public policy, obviously was made in course of debate and is not an accurat statement of the Joint Resolution. Irrespective of th point in controversy in this case, the Joint Resolution doe not itself so limit its application, but declares contract requiring payment in a particular kind of coin or currenc or in an amount in money of the United States measure by gold or a particular kind of coin or currency to be invalid, as well as contracts payable in gold. It is interesting that the petitioner finds it necessary to interpolat the word "solely" before the word "payable" in th Joint Resolution in order to attempt to make its point a to the limited application of the Resolution.

Petitioner's Argument II B 2 (pages 80 to 82, its brief

On page 81 the petitioner confuses the distinction between "due" (as meaning "matured") and "payable. The Circuit Court of Appeals below said that the bond were payable on June 5, 1933, in money of the Unite States. It did not say that the bonds were due on tha date, as petitioner seems to think. Neither responden nor the courts below stated that Congress intended to accelerate the maturity of contracts containing multip currency clauses as of June 5, 1933.

Petitioner's Argument II B 3 (pages 82 to 88, its brief

Petitioner complains that if the second sentence of th Joint Resolution is given its literal meaning it would accomplish the entire purpose of the Joint Resolution with out the necessity of specifically condemning certain typ

of clauses in the first sentence of the Resolution. Petitioner argues that therefore it should be limited to obligations containing the clauses mentioned in the first sentence, despite the careful inclusion in the second sentence of the clause "whether or not any such provision is contained therein or made with respect thereto." Petitioner wishes to read "whether or not" as meaning the same as "if." To reach the construction desired by petitioner, words must be read as implying the exact antithesis of their proper meaning.

On page 85 we have again the admission by petitioner that if a foreign money option had been inserted in an instrument for the express purpose of avoiding the ban on gold clauses found in the Joint Resolution, then there might be sufficient basis for bringing that clause within the Resolution. If it is illegal to accomplish indirectly the result condemned by the Joint Resolution after June 5, 1933, we submit that it is illegal to enforce after June 5, 1933, contracts entered into before that date indirectly accomplishing the same result.

Petitioner's Argument III (pages 88 to 98, its brief).

We need devote only a few words to petitioner's argument concerning the alleged unconstitutionality of the Joint Resolution if applied to the foreign money options here involved. The constitutionality of the Joint Resolution as it applies to the traditional gold clause has been upheld by this Court in **Norman v. B. & O. Railroad Co.,** 294 U. S. 240. If respondents' contentions as to the true nature of the bonds in question, as expressed herein, are correct, the Joint Resolution as applied to the foreign money alternatives is constitutional. There is no constitutional inhibition against removing the obstruction to the power of Congress to regulate the value of money presented by bonds containing foreign money options merely

We have one comment to make upon the distinction which the petitioner endeavors to draw (on page 70) between the **Holyoke** case and the instant case. Petitioner says that each of the alternatives in the **Holyoke** case, viz., the alternative to secure bullion and the alternative to receive money of the United States, was condemned by the Joint Resolution. This assertion overlooks the fact that the bullion alternative was condemned only if it were contained in an obligation payable in money of the United States so that the preliminary determination of the Court was necessarily that such an alternative contract was payable in money of the United States. If it is payable in money of the United States, the second sentence of the Joint Resolution directs the method of discharge. Furthermore, upon the facts of the case at bar, however it may be in regard to multiple currency bonds as a group, we cannot agree that the promises to pay in foreign moneys amounted to more than promises to pay the equivalent of United States gold coin. When the contract is viewed as a whole in its setting, it is apparent that the promisees did not desire guilders per se, but merely as a means of securing the value of the United States gold coin. However the contract may be verbally expressed, its true intent was to pay $1,000 in United States gold coin or the equivalent thereof in specified foreign moneys. **The striking resemblance between this case and the** HOLYOKE **case is that the American bondholders in this case had no more use for the guilders as such than the lessor in the** HOLYOKE **case had use for bullion.**

This Court has found the Joint Resolution to be constitutional, and accordingly debtors having issued bonds containing gold clauses may discharge their indebtedness in legal tender. **Norman v. B. & O. Railroad Co.,** 294 U. S. 240. This Court has found that the gold clause contained in United States Government obligations could not be invalidated by legislation, but it further found that the hold-

ers of such bonds had not established the fact that they incurred any damage by reason of being paid in United States currency, so that in effect such holders were confined to legal tender. **Perry v. United States**, 294 U. S. 330. This Court has held that where, in order to avoid the contingency of monetary depreciation, a lessor has contracted for payment in either gold bullion or in money of the United States measured thereby, the Joint Resolution directs that the obligation may be paid in an amount of United States currency equal to the gold coin by which the bullion obligation had been originally measured in the lease. **Holyoke Water Power Co. v. Paper Co.**, 300 U. S. 324. It has been held that the United States Government may call and redeem in legal tender the obligations which were subject to redemption according to their face in United States gold coin. **Smyth v. United States**, 302 U. S. 329. These rulings are proper and consistent and they carry out the underlying purpose of adjusting the domestic economy to the new order created by the reduction in the gold content of the dollar. Can it be that this Court, having advanced step by step to the very threshold of this case, will now turn back and find that there is a way whereby parties in the past have avoided, and parties in the future may avoid, the provisions of the Joint Resolution?

Petitioner's Argument II B 1 (pages 74 to 80, its brief).

This part of petitioner's brief is in response to the respondents' argument set forth at pages 21 to 33, supra.

We have pointed out above, page 23, that whether or not the word "obligation" is used as indicating the instrument or the duty, it is clearly employed in the Joint Resolution as meaning the whole instrument or the whole complex of duties arising from the bond contract.

The quotations from the Congressional Record appearing on pages 76 and 77 of petitioner's brief do not ex-

of the definitive valuation of the dollar to relieve thos parties who were United States money debtors from a intolerable enhancement of their indebtedness by reaso of the Congressional action, and an equality of treatmen was the **desideratum** sought. Can it be believed that an member of that Congress voting for the Joint Resolutio intended that a loophole should be left whereby a bon holder, by running around an international stump, passin through Holland en route, could enrich himself substa tially at the expense of the Debtor and other creditors?

The record before Congress strongly refutes the sugge tion which has been made by petitioner and by couns representing like interests to the effect that the seco sentence of the Joint Resolution was not intended to ha independent force, but was inserted merely to impleme and make effective the first sentence of the Joint Reso tion. It will be observed that the Committee Report the House, quoted on page 58 of petitioner's brief, giv equal emphasis to the content of the first sentence of t Joint Resolution and the content of the second sentence the Joint Resolution. Senator Fletcher said (Cong. Re 73d Cong., 1st Session, page 4991):

> "The Joint Resolution provides that every oblig tion, whether or not it contains a gold clause, shall discharged upon payment, dollar for dollar, in le tender."

It may be said that the first sentence of the Joint Reso tion condemns specific provisions, and that the seco sentence of the Joint Resolution gives the rule of equal of treatment in respect to all obligations payable in mon of the United States, which was the thing uppermost the mind of Congress.

The petitioner states, on page 59 of its brief: "T primary and apparently the only purpose of the Jo Resolution was thus to combat the unnatural demand

gold in this country." That demand had been combated by prior legislation making United States money irredeemable in gold. The purpose of the Joint Resolution was to avoid the burden upon debtors of paying additional currency on account of gold clauses and other clauses of the same effect contained in bonds payable in money of the United States. This is further indicated by the very language of the preamble of the Joint Resolution, which refers to the obstruction of the power of Congress to regulate the value of the money of the United States, and by reference to the inconsistency between gold contracts and the declared policy of Congress to maintain at all times the equal power of every dollar coined or issued by the United States in the payment of debts.

Petitioner says (page 60, its brief): "There can be no question that the options were deliberately inserted in the bonds and coupons as a special inducement to purchasers, both citizens and aliens." We agree, but, we ask: As a special inducement for what? The Circuit Court of Appeals below furnished the answer (R. 253):

> "the holder is secured from depreciation of the gold dollar not only by a gold clause provision but by a fourfold further assurance in these foreign currencies of values based on the specified gold dollar."

In other words, the special inducement, we submit, was that the provision afforded a facile method by which every bond and interest coupon, whether owned abroad or in this country, could be easily converted into payment in domestic gold dollars of a given weight and fineness or a foreign money measured thereby, most advantageous to the holder at the time of payment.

Petitioner's Argument II A 3 (pages 62 to 72, its brief).

Under this point petitioner endeavors to answer arguments heretofore made by us, supra. Our views have been sufficiently expressed.

ernment to lessen the gold content of the dollar Nevertheless, that power could not have been actually used if it entailed the redemption or payment of $100,000,000,000 of obligations at the rate of $169,000,000,000."

From the debates in Congress it is apparent that Congress had in mind not only the relief of debtors from the deplorable consequences which would otherwise follow from a reduction in the value of the dollar, but also an equalization of the burden as between various classes of debtors. Throughout the Congressional debates it was insisted that the Joint Resolution should be applied without discrimination between different classes. Mr. Steagall Chairman of the Committee in charge of the Resolution in the House of Representatives, said (Cong. Rec., 73d Cong 1st Session, at page 4586):

> "We cannot pay either class of these debts in gol and it is against public policy, it is contrary to ever dictate of common sense and justice to undertake differentiate between creditors whether the Govern ment or of individuals. Common sense and comm honesty suggest that there should be one standard value in this country and one kind of requirement discharge an indebtedness on the part of a citizen on the part of the Government.
>
> * * * * * * *
>
> "So far as the resolution itself goes it simply rea firms the existing status. I do not see how this actio alone could bring about the cheapening of mone which is so much deplored by those who oppose th resolution. If I had my way I would not under an conditions permit one citizen to contract for the di charge of a debt in one kind of currency and anoth citizen to contract for the discharge of a debt in a other kind of currency. It seems to me sound publ policy demands that there be no discrimination."

As an example of what a Congressman supporting the enactment of the Joint Resolution thought it accomplished, we quote from the remarks of Mr. Cross in the House of Representatives (Cong. Rec., 73d Cong., 1st Session, page 4799):

> "Now, let us talk about the moral part of this a moment. Oh, they say it is repudiation. Why, all we propose to do is to see that equal justice is done to both creditor and debtor."

Representative Reilly expressed the same thought (Cong. Rec., 73d Cong., 1st Session, at page 4803):

> "Again, it is submitted that it is inequitable for the Government of the United States to permit a situation to exist whereby a debtor who borrowed a dollar several years ago must pay today, in the liquidation of that debt, a dollar having a purchasing power of at least a dollar and a half.
>
> "It is not dishonorable for the debtors of our country to ask the right and privilege of paying their debts in dollars near the purchasing power of the dollars that they borrowed years ago."

Senator Barkley, in the debates in the Senate, said (Cong. Rec., 73d Cong., 1st Session, page 5011):

> "they [bonds] do not have a value that would be lost, because the enactment of this joint resolution will have no effect upon the real value of those bonds. But the owners of those bonds might be deprived of garnering an artificial profit which they might otherwise obtain if their bonds had to be paid in gold, while future bonds are to be paid in any money that is legal tender in the United States. There is quite a difference between taking away from somebody what he has and taking away from him the opportunity to make more out of it than he should at the cost of the welfare of the United States and the condition of our people."

It was the aim of Congress prior to the accomplishment

were done in its capacity as trustee under the powers
roneously assumed to have been granted by the indent
Thus, the so-called election does not purport to be an e
tion on behalf of bondholders and the so-called author
tions do not purport to be such elections as are requi
by the mortgage.

In acting as trustee, Guaranty Trust Company was
much the Debtor's representative as it was the repre
tative of the bondholders. In enunciating the Miss
rule on this aspect of mortgage trustee relations
Judge Wagner said, in **Goode v. Comfort,** 39 Mo. 313, t

> "Trustees are considered as the agents of both
> ties—debtor and creditor—and their action in
> forming the duties of their trust should be condu
> with the strictest impartiality and integrity. T
> are intrusted with the important function of tran
> ring one man's property to another, and there
> both reason and justice will exact of them to
> scrupulous fidelity."

This case is cited with approval in **Chas. Green Real Es
Company v. St. Louis Mutual House Building Comp
et al.,** 93 S. W. 1111 (S. C. Mo., 1906), and in **We
Axtel,** 17 S. W. (2d) 328, 334 (S. C. Mo., 1929). U
this rule it appears that a trustee must impartially
cute his duties and avoid favoring the mortgagees.

It is not necessary to speculate as to **why** the bondh
ers failed to make the election. Perhaps it was bec
the bondholders tacitly perceived the considerations w
caused the observation of the court in **City Bank Far
Trust Co. v. Bethlehem Steel Co.,** supra, that "Min
of its underlying purposes, good citizenship requires
the resolution should be accepted in a spirit which wil
permit an unfair advantage of the creditor at the exp
of the Debtor." Perhaps it was because the holders o
bonds felt safer in having them payable in Ame

money than to experiment with payment in a European money with which they were not familiar. Perhaps it was because of indifference. Whatever the cause, the holders having refrained from making an election to receive guilders, the mortgage trustee cannot make such an election.

The petitioner apparently was puzzled as to the election feature, for the proof of claim states that the election is made "except on those bonds or coupons, the holders of which have made their own elections as to the money of payment." Thus petitioner tried to make an election with reservations—it elects guilders and yet it does not elect guilders. This half-hearted effort clearly indicates that the mortgage trustee realized that it had no power to make a final election. **We go one step farther and say that it has no power to make an election of any sort.** The petitioner, when it made "demands" abroad, had no bonds —at least no bonds here involved—and it has recognized its inability to make a final election for the holders of the bonds. An election must work both ways and be binding upon creditor as well as debtor.

Clearly, among the various powers conferred upon the mortgage trustee by this indenture there was not included the power to exercise an election of the medium of payment. This power is reserved to the bondholders. We submit that if the guilder clause has any validity it can be applied only to those bondholders who, in exercising their own discretion, made a valid and timely election for allowance of their claims on a guilder basis. If the Court should so hold, each individual claim of bondholders who filed claims and purported to elect guilders would require a full hearing to determine the validity and timeliness of the exercise of the option and the measure of damages, if any, and provision is made therefor in paragraph 19 of the stipulation (R. 168).

to prosecute all actions clearly contemplates such ac tions as are in the interest of the bondholders as a class and is not intended to apply to a single cause o action which cannot affect the bondholders as a class Pigeon River Ry. Co. v. Champion Fibre Co. (C. C A.), 280 F. 557."

In **Denney v. Cleveland & Pittsburg R. Co.**, 28 Ohio S 108, it was held that the right to convert bonds into stoc existed in the holder of the bonds, and could not be tran ferred independently of the bonds. The court said (pag 114):

> "The truth is, as we apprehend, that by the expre terms of this convertible clause the conversion of t bond into stock is made to depend wholly upon t pleasure of the holder of the bond. * * * The term of the clause clearly connect the right of conversi with the ownership of the bond as indissolubly as mortgage is connected with a debt, the payment which it secures."

In **Cheatem v. Wheeling & Lake Erie R. R. Co.**, 37 (2d) 593 (D. C., S. D., N. Y.), the court, considering righ in respect to convertible preferred stock of the railro company, observed:

> "The option given in the certificate under consi eration here is in effect an offer to each person w becomes a holder of record of the preferred stock, a like any other offer, can be accepted or availed of o by the persons to whom it is made and must be a cepted or availed of precisely in accordance with terms."

In **Werner Harris etc. v. Equitable Trust Co.**, 35 F. (2 513 (C. C. A. 10), it was held that the trustee of a bo issue was without power to bid in the property upon fo closure sale in behalf of the bondholders, the court reas

ing that "Each bondholder has the absolute right to determine for himself, in case of default, whether he shall take his loss and quit or continue to gamble."

It has been held frequently that the granting of rights in a mortgage to a trustee does not bar purely individual rights of the bondholders, and that a bondholder may forego the mortgage security and sue on his bonds. See **Dunham v. Omaha & Council Bluffs Street Ry. Co.**, 25 F. Supp. 287 (advance sheets); **Manning v. Norfolk Southern R. Co.**, 29 F. 838; **Muren v. Southern etc. Co.**, 160 S. W. 835 (Mo. App.), and note, 108 A. L. R. 88. By analogy these authorities apply here, for in the instant case the individual rights of the bondholders in regard to an election are even stronger. The mortgage specifically reserves these rights to the bondholders.

The mortgage in the instant case is clear in its terms. But even if this indenture were ambiguous as to the rights, duties and obligations of the mortgage trustee, petitioner's contention that it has a right to make the guilder election could not be sustained. On this point **Quindry on Bonds and Bondholders** (1934) says at page 307:

> "While the trustee is a representative of the bondholders, it acts in such representative capacity only within the limits of its authority, and it is only in executing the trusts that it represents the bondholders. **Where its powers are disputed, and the interpretation of the language conferring its power is ambiguous, it does not represent and cannot bind the bondholders relative to that question.** In a case where such questions are involved, the bondholders are necessary and proper parties."

See, also, **Johnstown and G. R. Co. v. New York Trust Co.**, 233 App. Div. 443 (1931), 254 N. Y. S. 266; **Colorado & Southern Railway Co. v. Blair**, 214 N. Y. 497, 108 N. E. 840 (1915), rehearing denied 215 N. Y. 697, 109 N. E. 1071.

It may be confidently asserted that there is no cas among all judicial precedents which permits a corporat mortgage trustee to exercise the election of a holder of secured bond to have the bond converted into stock. A is observed in the above cases, the right to convert is a individual right not affecting the class as a whole, depend ing upon the business discretion and choice of the investo owning the bonds. The exercise of an election to choos alien moneys instead of United States money is likewis **an individual right not affecting the class as a whole, an depending upon the business discretion and choice of th investor who owns the bonds.**

The attempt was made below to construe language use by the railway Trustee as an admission against interes In our motions to dismiss certain intervening petitio of a bondholder we said that the mortgage trustee has t right to represent the interests of all bondholders. It hardly necessary to point out that we referred there interests which the mortgage trustee had the **right** to re resent under the mortgage and statutory provisions. W have never, at any time, admitted that the mortgage tru tee has power to exercise the foreign money option.

Petitioner made the assertion below that even the silen of bondholders constitutes a ratification of the trust co pany's "election." In other words, petitioner would ha the Court believe that the only persons who are given t right to elect made a guilder election by remaining sile Lack of action was interpreted as meaning: "We wa guilders." Petitioner referred to ignorance of the bon holders as to their rights and to their helplessness. Ev if these allegations be true, the condition cannot remedied by reading into the mortgage something whi is not there.

Although petitioner boldly asserted that it is a credit and that title to the debt passed completely to it and th it had the right to elect, signs of weakening appear

when reference was made in its brief below to certain so-called letters of authorization received from a few bondholders. Why were authorizations necessary if the mortgage trustee has such omnipotent powers? The letters are worth nothing. They cannot constitute an election because they were not addressed or communicated to the Debtor or its Trustee. Obviously, an election by a promisee must be made by addressing and delivering a communication to the promisor or to its representative, and in this case the party exercising the election could do so only by letter or other communication to the obligor, the St. Louis Southwestern Railway Company, and to its representative, Berryman Henwood, Trustee. See 13 Corpus Juris 629; **Bohall v. Diller,** 41 Cal. 532. In no event could the letters have any bearing on the acts of the mortgage trustee, which, as it has stipulated, were done by it solely as trustee under the mortgage.

The purported election by Guaranty Trust Company of New York was made in its capacity as trustee, and it so stipulated (R. 160). In paragraph 9 of the stipulation (R. 160) it was agreed "the acts done as aforesaid were done by Claimant as Trustee of the said indenture"—referring to the attempted demand in Amsterdam, Holland, and the filing of proof of claim as set forth in paragraph 8 of the stipulation (R. 159). This is clear enough from the bailiff's certificate, attached as Exhibit A to the stipulation (R. 169), wherein it appears that the demand made in Holland was in behalf of the Guaranty Trust Company of New York "acting in this instance in its capacity of trustee under an Indenture of Mortgage." In paragraph 9 of the stipulation (R. 160) the petitioner reserved a right to show that acts performed had been expressly authorized by certain bondholders. This it has attempted to do, but the difficulty is that the acts done by petitioner were not done as agent for particular bondholders, but

neither the interest nor the principal is payable at th office of the trustee, or through its agency, the bond holders, after purchase, deal directly with the mort gagor, and generally only in case of default do they invoke action on the part of the trustee."

In **Moran v. Hagerman,** 64 F. 499, 505, the Circuit Cour of Appeals for the Ninth Circuit applied the rule that "I is only where the trustee acts for the bondholder withi the scope of the powers conferred upon him by the dee of trust that his acts bind the latter."

In a recent decision of the Circuit Court of Appeals fo the Second Circuit, in **In re Allied Owners Corporation,** 7 F. (2d) 201, 97 A. L. R. 360 (1934), in which a trustee wa held not to have the power under a trust mortgage to bin the majority of bondholders against their will in a re organization proceeding, the court used the following lan guage:

> "The powers and duties of this trustee are measure by the terms of the indenture of mortgage and w must look to that instrument for all the authority o the trustee. Colorado and Southern Railway Com pany v. Blair, 214 N. Y. 497, 108 N. E. 840. * * In order to make the acts of the trustee binding o the bondholders, the trust deed or mortgage by it terms must show that the trustee was authorized t represent the bondholders, for the trustee has n power or authority to compel the bondholders to mak a new and different contract, nor has it the power t discharge or compromise the security which it hold as trustee. Clark v. St. L. A. & T. H. R. R. Co., 5 How. Prac. (N. Y.) 21; Miller v. Rutland & W. Ry Co., 36 Vt. 452; Thompson on Corporations (2d Ed. Sec. 2593. * * *
>
> "Cases holding that, when a trust deed is suffi ciently explicit, the trustee may file a proof of clai thereon in a bankruptcy proceeding on behalf of a

bondholders [In re Paramount Publix Corp. (C. C. A.), 72 Fed. (2d) 219; In re United Cigar Stores Co., 68 F. (2d) 895 (C. C. A. 2)], do not imply that a trustee thereby has an independent status as a creditor empowering him to decide whether to accept a smaller amount or extend the time of payment. * * * The creditors' beneficial interests are not to be impaired by a trustee exercising such power unless it clearly appears that such power has been given. * * *

"* * * The trustee's judgment must not be substituted for that of the real creditors. * * *"

The above principles were approved by the Circuit Court of Appeals for the Eighth Circuit in **Bitker v. Hotel Duluth Company** (1936), supra. See, also, **Gerdes on Corporate Reorganization**, Sec. 744, page 1202, and Sec. 1124, page 1783; **In re Prudence Co., Inc.** (D. C. N. Y.), 22 F. Supp. 264; **Martin v. Rockford Trust Company**, 281 Ill. App. 441 (1936), and **Rathje v. Serb**, 287 Ill. App. 142 (1936), 4 N. E. (2d) 750.

The case of **Brooks & Co. v. North Carolina Public Service Co.**, 32 F. (2d) 800, closely approaches this case. An action was brought by a bondholder against a corporation to recover damages for the failure of the corporation to permit a conversion of the bonds into stock as authorized by the bonds. One of the defenses was that the claim should be asserted through the trustee of the indenture securing the bonds. This defense was overruled by the court and it was pointed out that the right to elect the method of performance was in the holder of the bonds and not in the trustee. It was said at page 802:

"The refusal of the corporation to make the conversion at the demand of a bondholder creates in its favor a right of action which does not affect the other bondholders as a class, and it is a right which it may assert without the necessity of resorting to the trustee as an intermediary. The usual requirement for the trustee

thought of making the trustee a fiduciary for the bondholders for all purposes. To the contrary, the rights, duties and powers of the trustee are rigidly prescribed. For some purposes it represents the debtor corporation; for other purposes it represents the bondholders. Singularly, the Guaranty Trust Company of New York, which seeks without authority to demand payment in guilders for the bondholders, had been expressly designated as the paying agent for the Debtor. This emphasizes the untenable position of the petitioner: although an agent of the Debtor, it attempts to force upon the Debtor the unexpressed "will" of the bondholders. Petitioner sought below to support its "right" to make election as trustee of the indenture by reference to the line of cases represented by **In re Paramount Publix Corporation**, 72 F. (2d) 219, and **In re International Match Corporation**, 3 F. Supp. 445. The holding of these cases is that where, in addition to the promises contained in the bonds, there is a promise to pay the bonded indebtedness to the trustee contained in the indenture securing the bonds, it is permissible for the trustee to file a proof of claim in bankruptcy for the entire indebtedness and to receive dividends thereon. These holdings are not directly applicable to a Section 77 proceeding, because as pointed out, Paragraph (c) (7) of Section 77 expressly authorizes a mortgage trustee to file a claim for the entire issue. Nor do these cases bear upon the question as to the proper party to make an election. As pointed out in **In re International Match Corporation**, supra, though there are several promises, there is but one debt. The election to transform such indebtedness from a dollar indebtedness to a foreign money indebtedness in respect to any particular bond must reside at one time in one person only, since there can be but a single election. The bond and indenture specifically provide that the person to make an election is the bondholder. The supplemental promise in the indenture to the trustee is in respect to the payment of the in

debtedness owing to the bondholders upon the elections to be made by the bondholders.

There is a great deal of discussion, judicial and otherwise, in respect to the limits of responsibility of the trustee of the modern deed of trust. **Posner, "Liability of the Trustee Under the Corporate Mortgage Indenture,"** 42 Harvard Law Review 198; **Posner, "The Trustee of the Trust Indenture,"** 46 Yale Law Journal 737; **McCollum, "The Securities and Exchange Commission and Corporate Trustees,"** 36 Columbia Law Review 1197; Note, 33 Columbia Law Review 97. The law in New York was summarized in **Hazzard v. Chase National Bank,** 159 Misc. 57, 287 N. Y. Supp. 541, 566 (1936), as follows:

> "Irrespective of holdings or tendencies in other jurisdictions, it is now the well-settled doctrine of this state that so long as the trustee does not step beyond the provisions of the indenture itself, its liability is measured, not by the ordinary relationship of trustee and cestui, but by the expressed agreement between the trustee and the obligor of the trust mortgage. Where the terms of the indenture are clear, no obligations or duties in conflict with them will be implied."

Years before, a similar statement was made by Mr. Justice Brewer, sitting in the Circuit Court for the Western District of Missouri, in **National Waterworks Co. v. Kansas City,** 78 F. 428, 434:

> "It must be borne in mind that the trustee was selected and the terms of the trust prescribed by the mortgagor alone, and that, until after the bonds were negotiated, it was acting only as the latter's agent. It is true that, after the purchase of the bonds, the bondholders look to the trustee for the discharge of certain duties, but only such duties as it has promised to perform; and, to the extent that those duties inure to their benefit, they may properly hold it liable for any default therein. If, by the terms of a mortgage,

mortgage trustee could obtain title to the debt, the amount of the debt must be determined by an exercise of the foreign money option **by the bondholders.**

The trust company stated that it could not exercise the right granted by statute (to file a blanket claim) unless it also had the power to elect. In fact, it stated below that such power flows from the statute, and in support of this view it quoted that portion of the statute which specifically prevents the trustee from representing the bondholders for the purposes of accepting or rejecting a plan of reorganization. Obviously, this limitation has the opposite effect. The exercise of the guilder option might seriously affect a plan and the position of these bondholders in connection therewith. The exercise of the option is as much a matter of discretion as is the acceptance or rejection of a plan, and since the guilder issue has been injected into all plans of reorganization filed with the Interstate Commerce Commission it is inextricably associated with any plan. It is just as essential that the bondholders be allowed to exercise the rights given to them by the mortgage as it is that they be allowed to exercise their own discretion in regard to a plan of reorganization. There is nothing inconsistent in allowing the mortgage trustee to perform the mechanical act of filing a blanket claim, but reserving all personal rights, including the exercise of the option, to the bondholders.

In its effort to find some ground on which to base its action in attempting to take over the rights and powers of the bondholders, the mortgage trustee has misinterpreted the plain meaning of paragraph (c) (7) of Section 77 (which allows mortgage trustees to file blanket claims). Petitioner has construed this paragraph to constitute a prohibition against the filing of claims by the bondholders. We submit that no such construction of the statute can stand. The statute says that if a mortgage trustee files a

claim in behalf of all the bonds, "it shall be **unnecessary** for the holders * * * to file claims in their own behalf." Merely because something is unnecessary does not mean that it is prohibited. In this proceeding many individual bondholders have filed proofs of claim, as they were allowed to do (R. 168). This illustrates the lack of merit in petitioner's position.

Although the statute authorizes mortgage trustees to file blanket proofs of claim for the bondholders, it does not give authority to create rights or to select positions or to exercise options in behalf of the bondholders. The Circuit Court of Appeals for the Eighth Circuit has held that in the absence of this statutory authority, a mortgage trustee would not have a right even to file a claim for the bondholders. It said in the **Blumgart** case, supra:

> **"Except for the above statutory permission,* the trustee could not file claims for the bonds."**

To the same effect see **Fitkin v. Century Oil Co.**, 16 F. (2d) 22 (C. C. A. 2d, 1916).

Petitioner's position on the right of election was summarized in its brief in the District Court in the following language:

> "The proper interpretation of Section (c) (7) of Section 77 is that the Trustee, who is thereby given the right to file such proof of claim, must also have the right and the power to do everything essential to bring that claim to fruition by judicial allowance, which includes, of course, the exercise of the multiple currency option. Otherwise, there is no meaning to the provision that upon the filing of such proof of claim by the Trustee 'it shall be unnecessary for the holders of such bonds or securities to file claims in their own behalf.' "

*That part of Section 77 which is involved here.

This argument is meaningless. The bondholders are the judges as to what constitutes "the full measure of their rights." These rights may be fully protected by the action by the bondholders allowed by the mortgage. Nothing will be added thereto by transferring the rights to the mortgage trustee. The bondholders might have exercised their rights of election without filing claims. Therefore, there is no reason for attempting to broaden the limited authority given to the mortgage trustee by the statute. The exercise of an option in a mortgage and the filing of a claim are not the same thing. These acts may and in ordinary course will be done separately. They must be done separately where the claim is filed by the mortgage trustee. Neither Order No. 81 of the District Court (R. 193), nor paragraph (c) (7) of Section 77, on which that order was based, contemplated that an attempted exercise of the guilder option should be made in proofs of claim. On the other hand, they do not prevent such an attempted election in proofs of claim filed by bondholders, for the right of election, if valid, was in the bondholders. **The right of the mortgage trustee, however, is limited by the statutory language—it is only a right to file a claim.** See the **Blumgart** case, supra.

Petitioner concluded that if its election was invalid, no election will be made unless the owners act for themselves. This is true and in the absence of such an election the bonds will be payable in dollars. But this is no "sorry trap for the bondholders." It is not true that such a construction runs counter to the object of Section 77 to promote expedition of reorganizations. **Section 77 did not alter or undertake to alter the substantive rights of creditors, and the statutory procedural right given to mortgage trustees to file claims does not carry with it a deprivation of personal rights of bondholders.** Section 77 speaks for itself and we have searched it in vain for any statement

that mortgage trustees are to be vested with all rights and title given by the trust indentures to the bondholders.

The Circuit Court of Appeals for the Eighth Circuit clearly stated the meaning of the statute in the **Blumgart** case and under that decision, we submit, there can be no conclusion but that petitioner distinctly does not have the right to make the guilder election. Since neither the mortgage nor the statute gives such right to the petitioner, its alleged right to make the guilder election has been grasped out of thin air. It **may** file a blanket claim, but it **may not** make an election. In light of this decision, the authorities cited below by petitioner are entirely irrelevant. Furthermore, the cases cited by petitioner were not concerned with Section 77, whereas in the **Blumgart** case the court below construed the very portion of the very statute in question.

Other attempts were made by petitioner to justify its so-called right of election. It said that the trust relationship itself gives the trustee a right to elect. The reason for this, it said, is that the election of guilders was to the advantage of the bondholders. If this reasoning be adopted, we assume that if this Court should uphold the guilder claim as of the effective date of the reorganization plan, and if at that time the guilder had dropped in value so that a claim based on guilders would not be to the advantage of the bondholders, petitioner would conceive it to be its duty to renounce its alleged right to make an election, or to assert that by reason of the changed conditions some new right would spring into being, whereby the "election" could be recalled and another currency could be selected.* The argument that the trustee has rights to fit the advantages to be gained is too far-fetched to merit consideration.

The modern corporate trust deed is not drawn with the

*Petitioner's purported election followed the accelerated maturity of the bonds by nearly five months. It is to be assumed, therefore, that petitioner believes that the election might be made several years after maturity.

In corporate reorganization proceedings there is no basis whatever for the argument that the claim must be determined upon the basis of the facts existing on or prior to the date of the reorganization petition.

(2) Although the discussion may be academic in this case concerning a corporate reorganization, we cannot concede that petitioner viewed correctly the rule applicable in ordinary bankruptcy proceedings. The view that to be provable in ordinary bankruptcy a claim must not be contingent at the time of filing of the petition in bankruptcy, or that the amount must be ascertainable upon facts existing at that time, is not to be accepted without qualification, since the decisions of this Court in **Maynard v. Elliott**, 283 U. S. 273, and **Brown v. O'Keefe**, 300 U. S. 598. Professor Williston, commenting on these decisions, 6 **Williston, Contracts** (Rev. Ed.), Section 1993, page 5595, says:

> "These decisions and the language of the opinions in them make it evident that such previous decisions of lower Federal courts or State courts as are based on the assumption that contingent debts as such are not provable must be regarded as overruled."

Although this Court has refrained from generalizing, we take it from the above cases that a contract claim may be provable in bankruptcy if uncertainties in respect thereto are dispelled during the course of administration of the bankrupt estate so that the allowance thereof will not hold up the distribution of assets to creditors. An interesting discussion is contained in the article, "**Contingent Claims in Bankruptcy**," 6 Fordham Law Review 18, 31 (January, 1937).

When we come to determining the amount due by a bankrupt upon the breach of a unilateral executory contract, we see no reason why the ordinary rules of damages should not apply, even though they call for ascertainment

of values subsequent to the date of the filing of the bankruptcy petition. Even where the **status** of claims is determined on the date of the bankruptcy petition, the **amount** of the claims is to be determined upon the basis of the contract. The contract time of performance is not arbitrarily to be the date of the filing of the petition. Damages for a breach of a contract are to be determined in bankruptcy upon the ordinary principles of damages existing in other cases. **In re Carrier,** 21 F. (2d) 589 (Dist. Ct., Mass); **Collier on Bankruptcy** (13th Ed.), p. 1419. In 6 **Williston, Contracts** (Rev. Ed.), Section 1987, page 5589, it is observed:

> "The amount of damages provable presents no different question in ~~bankruptcy~~ than that which arises when an action is brought against a solvent defendant on an anticipatory breach. The problem has been previously discussed. Facts subsequent to the bankruptcy should clearly be admitted as an aid to fixing the true value of the claim at the time when the petition was filed."

In the case of contracts for the sale of real and personal property other than foreign moneys, the measure of damages is usually the difference between the market price and the contract price at the time of performance. It would seem obvious that where the contract time of performance is prior to the petition in bankruptcy, such date would be controlling, and not the date of the filing of the petition. A like result follows where the time of performance set by the contract is subsequent to the filing of the petition in bankruptcy. This was held in **In re Marshall's Garage,** 63 F. (2d) 759 (C. C. A. 2). In that case a claim was filed for damages for breach of the bankrupt's agreement to purchase real property on October 9, 1936. The adjudication in bankruptcy was made on January 4, 1930. The district court allowed a claim based on the value of the real

plan of reorganization. It is provisional, because
proceeding will be discontinued if reorganization is
accomplished. If so, ordinary bankruptcy, mortgage f
closure, or an equity receivership may ensue to accomp
the liquidation which the reorganization proceeding fa
to avert. The date of the petition in reorganization
not constitute a deadline or fixation point and does
have the significance that it has in ordinary bankrup
Finletter, in his text on **Corporate Reorganizations**, s
at page 267: "The date of the filing of the petition i
no importance in determining the provability of cla
under the reorganization sections; it is the date of
consummation of the plan which assumes significan
The Eighth Circuit Court of Appeals in **Lowden v. No
western National Bank & Trust Co.**, 84 F. (2d) 847,
certiorari denied, 299 U. S. 583, expressed its views
follows:

> "From this opinion of the Supreme Court we ga
> that the mere filing of the petition for reorganiza
> by the Rock Island, which in no sense constitute
> admission of insolvency, gave to the bank no r
> of set-off, and that, for that purpose, it could
> regard the petition, under the circumstances, as
> equivalent of a voluntary petition in bankruptcy.
> the purpose of set-off, it would not be consistent
> the provisions of section 77 to treat a debtor in
> organization proceedings as a voluntary bank
> unless it appeared that insolvency actually existed
> that liquidation and distribution of assets, rather
> reorganization and rehabilitation, was in order."

Thus contingent claims may be proved in reorganiza
proceedings, although they have not matured upon the
of the filing of petition, even though they could not b
proved in ordinary bankruptcy. **City Bank Co. v. Ir
Trust Co.**, 299 U. S. 433, 440. The rule in this respe

akin to the rule in equity receiverships as pronounced in **Wm. Filene's Sons Co. v. Weed,** 245 U. S. 597, 601, 602. The reorganization statute itself makes clear that all kinds of claims, whether in existence at the time of filing petition in reorganization or not, shall be provable. Title 11, U. S. C. A., Section 205 (b), provides:

> "The term 'claims' includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character."

This provision, making clear that in reorganization proceedings consideration must be given to claims of all kinds, whether provable in ordinary bankruptcy or not, and whether contingent, unliquidated, or uncertain in amount when the petition in reorganization was filed, controls the general provision, 11 U. S. C. A., Section 205 (l), that the statutes applicable to ordinary bankruptcy should control in reorganization proceedings where consistent therewith. See **Connecticut Railway & Lighting Co. v. Palmer et al.,** U. S. Sup. Ct., decided January 3, 1939. Interest may be allowed after the date of the petition in reorganization where claims are secured. **Gerdes, Corporate Reorganizations,** Section 631; cf. **Ticonic Bank v. Sprague,** 303 U. S. 406, 413. Facts arising after the petition in reorganization are constantly being taken into account in reorganization proceedings to determine the quantum of claims. **Connecticut Railway and Lighting Co. v. Palmer et al.,** supra; **Hippodrome Bldg. Co. v. Irving Trust Co.,** 91 F. (2d) 753 (C. C. A. 2), certiorari denied, 302 U. S. 748; **In re Paramount Publix Corporation,** 85 F. (2d) 42, 45 (C. C. A. 2), certiorari denied, 300 U. S. 655. In the last-cited case the Court said:

> "In actions upon anticipatory breaches the court does not shut its eyes to what has passed since the breach, or confine itself to the half lights which alone were originally available."

The order allowing or rejecting the claim is a judgm Title 11, U. S. C. A., Section 48 (Section 25 of the Ba ruptcy Act), provides for appeals "from a judgment all ing or rejecting a debt or claim of $500 or over." order allowing or rejecting the claim is the judgm and any order short thereof in respect to the claim is such a judgment. **J. W. Calnan Co. v. Doherty,** 224 U 145; **Duryea Power Co. v. Sternbergh,** 218 U. S. 299, Section 25 of the Bankruptcy Act is one of the portion the old bankruptcy laws which apply to Section 77 ca **Meyer v. Kenmore Hotel Co.,** 297 U. S. 160.

The judgment of the Court allowing a claim origin made in terms of guilders (R. 5) is the first occasion the Court to express the claim in terms of dollars. U the principles discussed, it should take the guilder a value on the date it is necessary to translate the gui claim into dollars. We believe that the value of guilder as of the date of the judgment allowing the c should control in ordinary bankruptcy proceedings. may also control in reorganization proceedings, and originally took that view (R. 111).

However, there is a possibility of error in applying eral principles too literally to corporate reorganiza proceedings without giving due weight to the pec purposes of such proceedings, as this Court has poi out in **Lowden v. Northwestern National Bank,** 298 U 160.

The purpose of a proceeding under Section 77 is to e a plan of reorganization. **Continental Bank v. Rock Is Ry. Co.,** 294 U. S. 648, 676. The proceedings prior to acceptance of a plan of reorganization and its confi tion by the court are provisional, for the whole proc ing will be dismissed if a plan is not confirmed with reasonable time. This Court said in **Lowden v. No western National Bank,** supra, l. c. 163, 164:

> "A proceeding to reorganize is not a bankruptcy, though an amendment to the bankruptcy act creates and regulates the remedy. From the fact without more that such a proceeding has been initiated, one cannot know that it will be necessary to have recourse to Section 68, which was meant in its enactment to prescribe the rule of set-off upon a distribution of the assets. That stage of administration, or the analogous stage of a revision of the debts, may never be attained in a proceeding to reorganize, though a petition has been approved and trustees have been appointed. If a plan of reorganization is not proposed or accepted, or, being proposed and accepted, is not confirmed by the court within a reasonable time, the whole proceeding may be dismissed, Section 77 (c) (7), the title to the estate thus reverting to the debtor. By that time there may even be ability to pay demands as they mature. What is done at the beginning amounts to little more than a provisional sequestration to give protection for the future."

Thus an order allowing a claim in a Section 77 proceeding is for the purpose of providing a measure for the securities or other assets to be distributed upon the confirmation of a plan of reorganization. The final step which fixes what the claimant against a railroad is to secure is the confirmation by the court of the plan of reorganization. All preceding steps in the reorganization, including the allowance of claims, are both preliminary and provisional. Realistically, therefore, it is the order confirming the plan of reorganization which determines what the guilder claimants of the St. Louis Southwestern Railway Company will receive in dollars or dollar securities for their guilder claims in the event this Court should rule that such claims are valid. The judgment-date rule requires foreign moneys to be valued as of the date that the demand therefor is translated by judgment of an American court into United States money. There is force in the position that this

is not done prior to the order confirming the reorganiza plan and that it is done by that order. If so, the valu the guilder on the date of the plan of reorganization sh control.

This would afford an equitable solution (subject to underlying inequity of enforcing the guilder claim). petitioner has asserted a claim for guilders (R. 5) b upon bonds containing an option for guilders which it sought to exercise. We see no reason why the right First Terminal and Unifying bondholders, who elected guilders (or who have had guilders elected them), could not be fully preserved by providing in reorganization plan that securities payable in guil should be issued to such bondholders. No such provi for these bondholders has been proposed because i manifestly contrary to the public interest to inject into capital structure of a reorganized American railroad uncertainties of a foreign money debt. Approval of Interstate Commerce Commission therefore could not be ticipated. Because of this consideration of the publi terest, the bondholders may be tendered securities in reorganization plan, in lieu of securities payable in ders, if their right to guilders is upheld, expressed in Am can money of a value equal to the guilders called under the guilder options of the First Terminal and U ing Bonds. It is the confirmation of the plan of reorg zation that causes the petitioner's prior demand for ders to be transposed into a dollar security, and there be no reasonable complaint on that score if the dollar the new securities measure the value of the guilders ca for by the old securities at the time the exchange is m certain by the order of the court confirming the reorgan tion plan. Nor is there any procedural difficulty. It is necessary in a Section 77 proceeding that all rights allowed in terms of dollars as it is in ordinary bankr

cies looking solely to liquidation. For instance, executory contracts may be adopted by the reorganized company. **Consolidated Gas, Electric L. & P. Co. v. United Railways & Electric Co.**, 85 F. (2d) 799, 805 (C. C. A. 4th), certiorari denied 300 U. S. 663. The petitioner filed its claim for guilders, and an order may properly be made, if the claim therefor is good, allowing it for the guilders demanded, to be valued in the reorganization proceeding at the value of the guilder upon the date of the order of confirmation.

What we are seeking is the true judgment date within the principles of **Deutsche Bank v. Humphrey**, supra, in a Section 77 reorganization proceeding. Manifestly it is either the date of the judgment allowing the claim or the date of the order confirming the plan of reorganization. So far as the respondents can now judge, it does not make any great difference to them financially which date is adopted. The considerations stated above incline us to the view that the date of the order of confirmation is the true judgment date in a reorganization proceeding.

C. **The Contention of the Petitioner That the Value of the Guilder Should be Taken at the Date of the Filing of the Petition in Reorganization May Not Be Accepted Because (1) Based Upon Cases Concerned with Ordinary Bankruptcies or Insolvency Proceedings Where the Petition Date Is Given a Significance Lacking in a Section 77 Proceeding; (2) Not Supported in Fact by the Cases Cited Even in Ordinary Bankruptcies or Receiverships; and (3) Impracticable of Operation Upon the Particular Facts of This Case.**

(1) We have developed, supra, page 120, the difference between reorganization proceedings under Section 77 and ordinary bankruptcies looking toward liquidation.

The filing of the petition in reorganization in a Section 77 proceeding is one step looking toward consummation of a

in **Tillman v. Russo-Asiatic Bank**, supra, at page 1025, as follows:

> "Where a debt is due in a foreign country payable in the currency of that country, and suit is brought on it in the United States, the Supreme Court has held the plaintiff should recover what that currency is worth in this country on the day of judgment."

The opinion of the Supreme Court in **Deutsche Bank v. Humphrey**, supra, made reference to the value of the foreign money at the time of bringing suit, but this was evidently an inadvertence and judgment was entered at the rate of exchange fixed as of the judgment date. See **Royal Insurance Co. v. Compania Transatlantica Espanola**, supra, and **Indian Refining Co. v. Valvoline Oil Co.**, supra.

Deutsche Bank v. Humphrey, supra, adopting the judgment-date rule, was a proceeding in equity, but the rule has been followed as a substantive principle of law at law and in admiralty.

Petitioner did not seriously dispute the general application of the judgment-date rule. It cited below certain authorities as supporting the performance-date rule, under which foreign moneys are valued as of the date of the time of performance instead of the judgment date in an action in this country. As pointed out above, **Hicks v. Guinness**, supra, decided in 1925, is confined in its application to cases where the place of payment of foreign moneys was in the United States, as is made clear by the subsequent Supreme Court decisions, particularly **Deutsche Bank v. Humphrey**, supra. This distinction is based upon principle, since where there is an agreement to deliver foreign moneys in the United States the parties are dealing with foreign moneys as a commodity, and the same measure of damages can well be applied for the breach of such a contract as is applied in the case of a breach of contrac

for the sale of commodities generally. Where, however, the agreement is to pay guilders in Holland or pounds in England, the claim is in terms of the money of the country of performance, and guilders or pounds will satisfy such a claim in such foreign country. It is not until suit is brought in this country that it becomes necessary to express the claim in the money of this country, since in such an action judgment may only be in terms of dollars. Certain English and state courts have entertained different views, but the rule announced by this Court has received endorsement in the **Restatement, Conflict of Laws,** 1934, Section 424. There are no Missouri decisions dealing with the subject. As is made clear by the **Restatement,** the question is determined by the law of the jurisdiction rendering the judgment. See **Beale, Conflict of Laws,** Sections 424.1, 424.2.

B. **Applying the Judgment-Date Rule to This Section 77 Reorganization Proceeding of a Railroad, the Guilder Should be Taken at Either Its Face Value Upon the Date of the Judgment Allowing the Claim or Upon the Date of the Order Confirming the Plan of Reorganization.**

A literal application of the judgment-date rule in a Section 77 reorganization proceeding fixes the time for the valuation of the guilder as of the date of the judgment allowing the claim. The filing of a proof of claim is not equivalent to the allowance of that claim. Title 11, U. S. C. A., Section 93 (d), provides:

> "Claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion."

election. It is asking for $1,687.72 per bond, which, of course, is $687.72 in excess of the dollar amount thereof. Moreover, since the value of the guilder was $.5560 on the date of the stipulation, this sum ($1,687.72) would purchase on that date 3,035 guilders, which is 545 more guilders than called for by the guilder option. Thus a claim for $1,000.00 or 2,490 guilders has grown in the hands of petitioner's skillful counsel to a claim for $1,687.72, or 3,035 guilders. Such a startling result is avoided by the application of the judgment-date rule.

A. In a Proceeding in This Country to Recover Upon a Contract to Pay Foreign Moneys in a Foreign Country, the Value of the Foreign Moneys Is Determined as of the Date of the Judgment.

The optional provision of the Debtor St. Louis Southwestern Railway Company's First Terminal and Unifying Bonds sought to be exercised by the petitioner, if valid, conferred the right to receive guilders in Amsterdam, Holland, and nowhere else (R. 19). The petitioner is seeking to enforce a promise of the Debtor to pay guilders in Holland, upon demand therefor in that country.

In determining the amount of a judgment to be rendered in this country in our money upon a claim for foreign moneys, this Court has adopted the judgment-date rule, i. e., wherever the place for payment is abroad, the amount of the claim for foreign moneys is computed at the value of the foreign money at the time of judgment, when it becomes necessary to translate the claim into terms of our money. The reason for adopting this latter rule is that if the holder of a contract for the payment of foreign money sued in a foreign country he could recover only a judgment for the foreign money, and if he sues in this country he should recover neither more nor less than the worth of the foreign money when payment is enforced by the entry of

judgment. If the judgment-date rule is not applied—the value of the guilder having fallen—a foreigner to whom guilders were promised could secure a judgment of greater value in this country than he could if he sued in the country where performance was due.

In **Deutsche Bank v. Humphrey**, 272 U. S. 517, this Court adopted the judgment-date rule as applicable where a contract called for the payment of foreign moneys in a foreign country. It distinguished its previous decision, **Hicks v. Guinness**, 269 U. S. 71, where the performance-date rule was applied, and confined the **Hicks** case to an action upon a contract for foreign moneys payable within the United States. That the judgment-date rule applies wherever the place of payment of foreign moneys was in a foreign country was again affirmed in **Zimmermann v. Sutherland**, 274 U. S. 253, 255. The Court said:

> "The distinction between the Deutsche Bank case and Hicks v. Guinness, 269 U. S. 71, is not, as argued, that the plaintiff in Hicks v. Guinness was in the United States, but that, as the court understood the facts, the debt was payable in New York and subject to American law, so that upon a breach of the contract there arose a present liability in dollars."

Since the decisions in these cases were announced the judgment-date rule has been applied uniformly by the federal courts. **Tillman v. Russo-Asiatic Bank** (C. C. A. 2d), 51 F. (2d) 1023 (law); **Royal Insurance Co. v. Compania Transatlantica Espanola** (Dist. Ct. N. Y.), 57 F. (2d) 288, 291 (admiralty); **Indian Refining Co. v. Valvoline Oil Co.** (C. C. A. 7th), 75 F. (2d) 797, 800 (law); **The West Arrow** (C. C. A. 2d), 80 F. (2d) 853, 858 (admiralty); **The Integritas** (Dist. Ct. Md.), 3 F. Supp. 891 (admiralty). See, also, 48 C. J. 606. For a discussion of these cases, see note at 105 A. L. R. 640. The federal rule was summed up

A consideration of the mortgage provisions and the s
utory language, in light of the decision in the **Blum**
case, leads to only one conclusion: that the purpo
guilder election by the mortgage trustee was wholly
valid and ineffective. This point in itself is sufficien
support the conclusions of the lower courts, irrespec
of the decision reached as to the effect of the Joint Re
tion.

III.

IF IT SHOULD BE DETERMINED THAT THE BO
ARE PAYABLE IN GUILDERS, DAMAGES
TO BE BASED ON THE EXCHANGE VALUE
THE GUILDER IN TERMS OF THE UNI
STATES DOLLAR AS OF THE JUDGMENT DA
I. E., WHEN THE CLAIM FOR GUILDERS
TRANSLATED BY THE ACTION OF THE RE
GANIZATION COURT INTO DOLLARS.*

If it should be determined that the bonds are pay
in guilders, the exchange value of the guilder in term
the United States dollar should be fixed in accord
with the "judgment-date" rule followed by this C
The application of this rule in a Section 77 reorganiza
proceeding is a matter of first impression. It seems
the controlling date is either the day of the order of
Court allowing the claim or the day of the order of
Court confirming the plan of reorganization.

If there were a rule, as petitioner contended below,
which we deny, that in ordinary bankruptcy the cl
must be valued as of the date of filing of the bankru
petition, it would be without significance in a reorga
tion proceeding. Moreover, it could not be applied u

*As explained supra, page 10, petitioner did not brief this poin
respondents deem it essential to present all points involved.

the particular facts of this case where the purported election to receive guilders was subsequent to the filing of the petition in reorganization.

The petitioner's alternative contention that the value of the guilder is to be determined as of the date of performance, which it varyingly fixes as the date of acceleration of maturity or the date of demand for guilders, may not be accepted under controlling decisions of this Court, the place of performance being abroad.

The facts may be summarized as follows:

The option sought to be exercised by petitioner is to receive guilders in Amsterdam, Holland. Petitioner is seeking to establish a claim based upon the high value of the guilder prevailing prior to September 27, 1936. When the bonds were issued in 1912 the guilder was worth \$.4020, and 2,490 guilders were worth approximately \$1,000 (R. 140, 168). Petitioner, in computing its claim, used a value of \$.6778 for the guilder, which was stipulated to have prevailed on certain dates prior to September 27, 1936 (R. 164). After September 27, 1936, the guilder dropped in value, and on the date of the signing of the stipulation it was worth \$.5560 (R. 165). It is worth somewhat less today. Petitioner has sought to establish a claim for \$1,687.722 per thousand-dollar bond, but, even though all of its contentions should be accepted, if its claim is computed upon the value of the guilder on the date of the signing of the stipulation the claim would be limited to \$1,384.44 per thousand-dollar bond.

The inequity of applying any rule in this case other than the judgment-date rule would be gross. Each of the First Terminal and Unifying coupon bonds called for \$1,000.00 United States money, or, at the option of the holder, 2,490 guilders. Petitioner is seeking to have a claim established which will give it more than the value provided by either

trict Court's 1937 summer recess had started. No claims could have been heard until the fall of 1937. This claim was one of the first matters set for hearing when the court resumed hearings after the summer recess, and it was the **first claim to be heard by the court in these proceedings** (R. 157). Petitioner's counsel are well aware of these facts and of the fact that the postponements of the hearing of this claim were **at their request.** The injunction was not against the filing of the claim (R. 136, 163), but against the acceleration of the maturity of the bonds, and the petitioner did file its claim pending that suit (R. 2, 137). The claim could have been brought to trial at any time, irrespective of the injunction against acceleration.

If the guilder claim should be allowed, the date upon which the claim of the petitioner for guilders is recognized in terms of dollars, whether that be regarded as the date of order allowing claim or the date of order confirming the reorganization plan, must control, under the applicable judgment-date rule, in ascertaining the amount to be allowed on account of the claim for guilders payable in Holland. If it should be argued that the judgment-date rule is inapplicable because this is a proceeding under a new statute, then our answer is that equitable principles must govern. No court has said what date governs in fixing the measure of damages on claims for foreign moneys in Section 77 proceedings. We urge that because of the very nature of the proceedings, the rate of exchange as of the judgment date (effective date of the reorganization) is the only proper rate to apply.

CONCLUSION.

This Court should approve the finding of the Circuit Court of Appeals that these bonds and coupons are not now payable in foreign moneys, and that the claim may be allowed only to the extent of the United States dolla

amount of the bonds, on the basis of the Joint Resolution of Congress of June 5, 1933. We submit that the opinion of the Circuit Court of Appeals should be affirmed.

In addition, the claim should be allowed only in said dollar amount because, even if the option clause should be held to be valid, petitioner had no power to make the purported election for the bondholders. Furthermore, if any recognition is to be given to the guilder claim, the amount should be governed by the exchange rate as of the date of confirmation of the plan of reorganization or date of the order allowing the claim, and not as of any other date.

In conclusion, we wish to summarize our principal contention—that the bonds are payable, dollar for dollar, in legal tender of the United States, for the reason that the foreign money option clause was made unenforceable by the Joint Resolution of Congress of June 5, 1933—for if the Circuit Court of Appeals' decision is affirmed it will be unnecessary to decide the points contained in the other contentions discussed above. **It is unthinkable that the Congress, acutely cognizant of the overwhelming pressure of the debt structure of this country and of the miseries and maladjustments entailed by the greatest deflation of our time, seeking to alleviate the situation so that means might be found to liquidate debts and thus save debtor and creditor alike, should consciously adopt monetary legislation which would, in effect, require debtors situated as is the respondent Debtor, to pay a premium of 70 per cent on account of their indebtedness. Yet this is the result which petitioner invites the Court to reach. The opposite, we believe, was the Congressional intent, as evidenced by its monetary legislation. There is no obstacle in the path of this Court to make such legislative intention effective, since this Court has sustained the constitutionality of the Congressional Resolution.**

The opinion and decree of the Circuit Court of Appeals should be affirmed.

Because the position of the Debtor in this matter is identical to that taken by the Trustee, no separate brief is being filed on behalf of the Debtor.

Respectfully submitted,

A. H. KISKADDON,
CARLETON S. HADLEY,
Counsel for Berryman Henwood, Trustee,
St. Louis Southwestern Railway
Company, Debtor, Respondent.

Dated at St. Louis, Missouri,
January 28, 1939.

APPENDIX A.

THE JOINT RESOLUTION OF JUNE 5, 1933.

(48 Stat. 112, Public Resolution—No. 10
73d Congress, H. J. Res. 192.)

"**Joint Resolution**

To assure uniform value to the coins and currencies of the United States.

Whereas the holding of or dealing in gold affect the public interest, and are therefore subject to proper regulation and restriction; and

Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts. Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not

suggested why that measure of damages should be changed by the filing of a petition in bankruptcy or reorganization.

The arguments of convenience made below by petitioner are not convincing. They have no greater point in a bankruptcy proceeding than in any other court proceeding, and this Court considered them, but did not yield thereto, in **Deutsche Bank v. Humphrey**, supra. No more forceful statement thereof can be made than was made by Mr. Justice Sutherland in his dissenting opinion in that case. A claim in bankruptcy may be tried as readily and as expeditiously as a claim for damages against a solvent corporation, and there is no more opportunity for jockeying for time in such a proceeding than in usual litigation—perhaps less.

(3) Under the particular facts of this case the rights of the parties could not be determined as of the date of the filing of the petition in reorganization. Petitioner cannot consistently insist upon the value of the guilder being determined upon the date of the reorganization petition and at the same time rely upon an election to receive guilders and an acceleration of maturity, made thereafter.

The practical application of the rule, as claimed by petitioner in this case, would mean that petitioner had no claim for guilders at all and that its claim therefor would have to be disallowed. The Debtor's petition under amendatory Section 77 of the Bankruptcy Act was filed on December 12, 1935. The earliest date on which petitioner's purported election to receive guilders occurred was September 24, 1936, when demand for guilders was attempted in Holland (R. 165, 169). If the rights of the petitioner congealed on December 12, 1935, there would be no claim for guilders, as there had been no election for guilders on that date. Another practical application of the rule urged by petitioner in this case is that the acceleration of the maturity of the bonds as of May 5, 1936 (after the filing

of the petition in reorganization), was meaningless, since the petitioner's rights were definitely fixed upon the date of the petition.*

Petitioner insisted that the railway Trustee is estopped from maintaining that the date of allowance of the claim is the proper date, because of the existence of an injunction against obtaining judgments against the Debtor. In this argument petitioner complained of the necessary results of trusteeship. It is unfortunate that reorganization became necessary, but we are facing facts and not what might have been had it not been for the trusteeship. The law sanctions the injunction against judgments and one of the consequences is the effect upon the bondholders. Petitioner's complaint against the injunction order (No. 1) amounts to a plea that petitioner be treated just as though the trusteeship had never existed. The injunction, which was unquestionably valid, is no excuse for changing the law as to the proper date for fixing the guilder value. The petitioner had as good an opportunity to file its claim and have it allowed as it would have had to get judgment if it had brought a suit for foreclosure and for an equity receiver.

Finally, petitioner cited the acceleration injunction and the alleged delay resulting therefrom as a reason for the non-applicability of the judgment-date rule. There has been no delay in the reorganization proceedings occasioned by the railway Trustee. The injunction proceeding did not delay the proceedings on this claim or the allowance thereof by a single day. The time for filing protests against proofs of claim did not expire until after the Dis-

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*If the acceleration as of May 5, 1936, has any meaning at all, the selection of that date is another reason why the quantum of the claim cannot be fixed as of the bankruptcy date, for by petitioner's own act maturity was fixed at May 5, 1936, to the exclusion of all other dates. Under petitioner's theory the value of the claim must be fixed before the bonds become due. This cannot be done. Thus, if the acceleration has any meaning, its effect is to require the application of the judgment-date rule.

ther performance on his part. On principle it has no ap-plication to unilateral contracts such as we have her **Restatement, Contracts,** Section 318. In **Smyth v. Unit States,** 302 U. S. 329, 356, a case involving the Joint Res lution, this Court observed:

> "But the rule of law is settled that the doctrine anticipatory breach has no general application to un lateral contracts, and particularly to such contrac for the payment of money only."

It has been expressly ruled that the doctrine of anti patory breach is without application to a unilateral co tract for the payment of foreign moneys. **Benecke Haebler,** 38 App. Div. 344, 58 N. Y. Supp. 16, affirmed 1 N. Y. 631, 60 N. E. 1107. But even if the doctrine anticipatory breach applied, as it does not, it is well s tled that damages are not to be determined upon the ba of the market value of the commodity concerned on the da of such anticipatory breach, but, instead, upon the date the time of performance. **Sedgwick, Damages,** 9th Ed., S tion 636 (b); **Roehm v. Horst,** 178 U. S. 1; **United Pr Association v. National Newspaper Association,** 237 F. 5 553 (C. C. A. 8); **Restatement, Contracts,** Section 338. T rule of the **Restatement** is: "The rules for determining t damages recoverable for an anticipatory breach are t same as in the case of a breach at the time fixed for p formance." Clearly, therefore, whether the filing of petition in bankruptcy is or is not an anticipatory brea the rule of damages otherwise applicable (in this case t judgment-date rule) applies.

Although some of the cases cited below by petition upon the determination of damages in bankruptcy or ceivership are confusing when first examined, a care study reveals that without exception they support the vi taken by the respondents that there is no peculiar rule

insolvency proceedings referring the determination of the measure of damages to the values existing on the date of the filing of a petition in bankruptcy or of adjudication, or the appointment of a receiver.

A case bearing upon the measure of damages, cited below by petitioner, is **Samuels v. E. F. Drew & Co.**, 292 F. 734 (C. C. A. 2). This case involved a contract by a corporation, later in receivership, to purchase cocoanut oil. The court did not apply a rule of damages unique to insolvency proceedings and did not hold that the commodity contracted to be purchased by the insolvent should be taken at its value on the date of the petition for a receiver in ascertaining the damages to be proved. To the contrary, treating the receivership as an anticipatory breach of the contract, it applied the rule of damages laid down by this Court in **Roehm v. Horst**, supra. Damages were (page 738 of the opinion)

> "determined by taking the difference between the contract and market prices on the date of the breach for the same quality of goods, not for immediate delivery, but for delivery at the time and place specified in the contract. Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953."

It will be noted that the damages were based upon the value of the commodities for delivery at the contract time of performance. As it appeared that on the date of the anticipatory breach there was a market for future deliveries of the commodity on the performance date, that value was taken rather than the value for spot delivery on the date of the anticipatory breach or on the contract date for performance.* This decision affirmed the lower court decision to the same effect, which is cited in petitioner's

*Petitioner did not establish the cost on the bankruptcy date of a contract for the future delivery of guilders on the maturity date. In respondents' view this did not constitute a failure of proof since the value of the guilder on the judgment date is controlling.

brief below as **Eldorado Oil Works**, 286 F. 278. In that case Judge Mack emphasizes:

> "If, on the anticipatory breach, there be a present market price for the goods to be delivered in accordance with the original contract, that price controls, not the market price for immediate delivery either at the time of breach or at the time fixed in the contract for delivery."

L. Hand, J., in **Callan v. Andrews**, 48 F. (2d) 118 (C. C. A. 2), and Professor Williston in his treatise on **Contracts** (Rev. Ed.), Sec. 1397, recognize the general rule that damages for anticipatory breach are computed on the same basis as damages for breach at the time of performance, referring to the **Drew** case as an exception to the general rule, to be applied only in a limited class of cases where there is proof of a present market for contracts for future delivery of the commodity involved. Judge Mack expressly said the rule he was applying was a special one, based on the duty to mitigate damages, and controlling whether the action was brought before or after the date of performance (286 F., at 279). Both Hand and Williston point out the impracticability of requiring the plaintiff as a general rule to anticipate the market and attempt to mitigate damages by making a new contract to replace the old. The other cases cited by petitioner are applications of the rule in the **Drew** case. The fuller statement of the rule is that stated in **In re Susquehanna Silk Mills**, 10 F. Supp. 787, 788 (Dist. Ct., N. Y.), likewise cited by petitioner, and which is as follows:

> "The rule in equity receiverships is that where the receiver renounces an executory contract of the insolvent to purchase commodities customarily sold for future delivery, the measure of damages provable by the seller is the difference between the contract price and the price at which he could have sold the commodity at the time the receiver was appointed

for delivery as required by the contract. The leading case is Samuels v. E. F. Drew & Co., 292 F. 734 (C. C. A. 2)."

The decision in **Samuels v. E. F. Drew & Co., Claim of Produce Brokers' Co.,** 286 F. 281 (Dist. Ct. N. Y.), referred to by petitioner, arose in the same proceeding as **Eldorado Oil Works.** When these cases are read together it will appear that Judge Mack applied the same rule in respect to the damages to be recovered upon a contract to deliver pounds sterling as in the case of the contract for cocoanut oil. In applying the same rule for damages in the case of foreign moneys as in the case of other commodities, Judge Mack followed the performance-date rule which was then the rule in the Second Circuit. See **Guiness v. Miller,** 299 F. 538 (C. C. A. 2), decided April 14, 1924.* For that matter, a performance-date rule may have been properly applied in that case under the present Supreme Court rule, as the place of performance seems to have been in the United States. As to **In re Banco Nacional Ultramarino,** 296 F. 882, another case arising from the E. F. Drew receivership, it does not appear that the performance date was different from the date of filing the petition for a receiver.

This review of the cases demonstrates that they have applied the rules of damages ordinarily applicable in the case of contracts, regarding bankruptcy or the appointment of a receiver as an anticipatory breach of the contract. The doctrine of anticipatory breach does not apply to unilateral contracts for the payment of money such as we have here, but, irrespective of that, it is now established that where the place of performance is abroad, the proper measure for judgment in a contract payable in foreign moneys is determined by the value of the foreign money at the date of judgment, and no reason can be

*Deutsche Bank v. Humphrey, 272 U. S. 517, was not decided until 1926.

property on January 4, 1930. The Circuit Court of Appeals, in reversing the decision, said:

> "The fact that an anticipatory repudiation is a breach of contract does not cause the repudiated promise to be treated as if it were a promise to render performance at the date of the repudiation * * *. In the case at bar the damages which the lessor-vendor would suffer from nonperformance by the lessee-vendee at the appointed time is the difference between the market value of her land on October 9, 1936 (when she had contracted to convey, but would retain it) and the purchase price she was to receive under the contract."

In **In re Griffin Manufacturing Co.**, 43 F. (2d) 624 (D. C. Ga.), the court was concerned with the effect to be given to facts mitigating the damages of a contract claimant after the filing of the petition in bankruptcy. These facts were regarded as pertinent, the court saying, at page 628:

> "In liquidating an anticipatory breach of contract the occurrences up to the time of trial may be proved and considered that throw light upon the damages really suffered."

Usually some estimate can be made by the bankruptcy court as to the value of the property at the future date of performance, in which case the claim is allowed. When, however, the value at such future time is entirely speculative, the claim must be disallowed. **In re Ray Long and Richard R. Smith**, 95 F. (2d) 525, 528 (C. C. A. 2). When a claim is filed against a bankrupt estate upon a money debt, payable at some future time without interest, appropriate discount must be made so as to reduce the claim to its present value. **In re Marshall's Garage**, supra.

In the instant case there was on the date of the filing of the petition in reorganization an unmatured claim for the payment of moneys. The fact that the indebtedness

did not mature until 1952 would not have prevented a claim thereon being filed in the bankruptcy proceedings. **In re Buzzini & Co.,** 183 F. 827, 830 (Dist. Ct., N. Y.). It could be proved to the same extent as a matured claim. It becomes necessary in such a proceeding to translate the claim for guilders into terms of dollars as of a date certain. Since the place of performance is abroad, the expression of the claim for guilders in terms of dollars should be made as of the date when such translation is necessary under the judgment-date rule adopted by the United States Supreme Court. The **measure of recovery** in dollars on such claim must be determined by the ordinary rules for fixing damages in the full light of the facts existing at the trial, and not in the half lights available at the date of filing of a petition in bankruptcy.*

Petitioner urged below the use in determination of its claim of the value of the guilder upon the date of the filing of the petition on the theory of anticipatory breach. Bankruptcy will constitute an anticipatory breach of an executory contract to which the doctrine of anticipatory breach is applicable (**Central Trust Company of Illinois v. Chicago Auditorium Association,** 240 U. S. 581), but it has been held that the filing of a petition in reorganization will not. **Consolidated Gas, Electric L. & P. Co. v. United Railways & Electric Co.,** 85 F. (2d) 799, 805 (C. C. A. 4), certiorari denied, 300 U. S. 663.

The doctrine of anticipatory breach is justified in reference to bilateral contracts where the anticipatory breach by one party should exempt the innocent party from fur-

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*If we should apply the performance-day rule, half-heartedly suggested by petitioner, and also apply the rule so strenuously urged that the status of this claim should be determined at the date of the filing of the petition in bankruptcy, it would follow that at the time of the filing of the bankruptcy petition the performance date (there being no acceleration at that time) was January 1, 1952. The rate of exchange upon the judgment date gives a better prediction of the value of the guilder on this 1952 maturity date than does the value of the guilder on the prior date of filing the petition in bankruptcy.

any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

(b) As used in this resolution, the term 'obligation' means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term 'coin or currency' means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations.

Sec. 2. The last sentence of paragraph (1) of subsection (b) of section 43 of the Act entitled 'An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes,' approved May 12, 1933, is amended to read as follows:

'All coins and currencies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations) heretofore or hereafter coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues, except that gold coins, when below the standard weight and limit of tolerance provided by law for the single piece, shall be legal tender only at valuation in proportion to their actual weight.'

Approved, June 5, 1933, 4:40 P. M."